APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 31, 2004 REVISED MAY 28, 2004

REVISED May 28, 2004

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 02-30760 c/w
02-30786

PETRO-HUNT, L.L.C.; et al.,

Plaintiffs-Appellees,

VERSUS

UNITED STATES OF AMERICA, et al.,

Defendants,

UNITED STATES OF AMERICA,

Defendant-Appellant.

PETRO-HUNT, L.L.C., et al.,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

Appendix A

Appeals from the United States District Court
for the Western District of Louisiana

Before EMILIO M. GARZA and DENNIS, Circuit Judges, and VANCE*, District Judge.

DENNIS, Circuit Judge:

Petro-Hunt, L.L.C., Hunt Petroleum Corporation, and Kingfisher Resources, Inc., (collectively "Plaintiffs") filed a declaratory judgment action seeking to quiet title to mineral rights in approximately 180,000 acres of federally owned land within the Kisatchie National Forest. Plaintiffs claim those rights as successors in interest to 96 mineral servitudes that were created before the United States purchased the land in the 1930s. The district court granted summary judgment in favor of Plaintiffs on the grounds of *res judicata* and denied Plaintiff's request for attorneys' fees. The United States timely appeals the district court's grant of summary judgment and Plaintiffs cross-appeal on the issue of attorneys' fees. Because we reverse district court's summary judgment ruling and remand for further proceedings not inconsistent with this opinion, we need not reach the merits of Plaintiffs' cross appeal regarding attorneys' fees since plaintiffs are no longer prevailing parties.[1]

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* District Judge of the Eastern District of Louisiana, sitting by designation.

1. Prevailing party status is a prerequisite to recovering attorneys' fees under 28 U.S.C. § 2412(b).

Appendix A

I. BACKGROUND

In order to give the proper context to our discussion of the merits of this factually dense case, we begin with a brief discussion on Louisiana mineral law, the servitudes in question, and the applicability of certain Louisiana laws to property owned by the United States.

A. *Mineral Servitudes Under Louisiana Law*

Louisiana law governing mineral servitudes does not recognize a separate mineral estate in oil and gas.[2] Mineral rights can be owned separate from the surface land only in the form of a mineral servitude.[3] Hence, any attempt to sell or reserve the ownership of oil and gas results in the creation of a mineral servitude, and the holder of that servitude has the right to enter the property and extract the minerals.[4] Louisiana law has long provided that a mineral servitude is extinguished by prescription resulting from ten years'

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2. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207, 243-245 (1920).

3. *Central Pines Land Co. v. United States*, 274 F.3d 881, 884 (5th Cir.2001).

4. *Central Pines*, 274 F.3d at 884. *See* La. R.S. § 31:21 ("A mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership."); *see also* Luther L. McDougal, III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1098-99 (1987).

nonuse.[5] The period of prescription on mineral servitudes begins to run on the date a servitude is created,[6] and is interrupted only by "good faith operations for the discovery and production of minerals."[7]

Because the rule of prescription reflects a public policy favoring "the timely return of outstanding minerals to the owner of the land,"[8] the rule may not be abrogated by contract.[9] The Louisiana Supreme Court has declared that "it is against the public policy of this state to allow . . . servitudes to remain alive for a longer period than 10 years without use," and that any contracts to the contrary are void as against public policy.[10]

B. *Creation of Mineral Servitudes*

In 1932, five Louisiana lumber companies—Good Pine Lumber, Trout Creek Lumber, Tall Timber Lumber, Bodcaw

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5. *Central Pines,* 274 F.3d at 884. *See* La. R.S. § 31:27.

6. *See* La. R.S. § 31:28; *see also Ober v. Williams,* 35 So.2d 219, 224 (1948).

7. La. R.S. § 31:29.

8. *See Mire v. Hawkins,* 186 So.2d 591, 597 (1966).

9. *See Leiter Minerals, Inc. v. California Co.,* 132 So.2d 845, 853 (1961). On the other hand, agreements to shorten the period of prescription do not conflict with public policy and are valid. *Id.*

10. *Id.*

Lumber, and Grant Timber—entered an agreement to pool the mineral rights on their respective land holdings in central Louisiana.[11] As part of the pooling agreement, the companies created a joint venture called the "Good Pine Oil Company" and separately conveyed to that company the rights to explore and develop their property for the production of oil, gas, and sulphur.[12] Of these conveyances, six that Bodcaw Lumber and Grant Timber made to Good Pine Oil between November 12, 1932, and May 3, 1934, are relevant to this case. All of these six conveyances involved multiple parcels of land, many of which were non-contiguous, and thus resulted in multiple mineral servitudes.[13]

Each of the six deeds conveying mineral rights to Good Pine Oil contained a clause providing that the ten year period of liberative prescription applied. Five of the deeds expressly stipulated that "none of said [mineral] rights in any of said lands shall be prescribed *unless there shall elapse a full period of ten (10) years in which there shall be no exercise of any of the foregoing rights or user of any of the lands* aforesaid under and by virtue hereof." The sixth contained

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11. *United States v. Nebo Oil,* 190 F.2d 1003, 1005 (5th Cir.1951).

12. *Id.*

13. *See Cox v. Sanders,* 421 So.2d 869, 873 (1982) (stating that "a landowner cannot create a single servitude or mineral royalty right on two or more non-contiguous tracts; and if this is attempted by a single instrument, there are nevertheless as many servitudes or royalty interests as there are non-contiguous tracts of land" and quoting *Whitehall Oil Co. v. Heard,* 197 So.2d 672, 675 (La.Ct.App.1967)).

strikingly similar language. Because the prescriptive period described in these instruments is equivalent to the liberative prescription period of ten years, the contract provision applying a prescriptive period of ten years is enforceable.

C. *Acquisition by the United States*

In the late 1930s, the United States acquired approximately 180,000 acres of land in three Louisiana parishes (Grant Parish, Natchitoches Parish, and Winn Parish) from Bodcaw Lumber and Grant Timber for inclusion in the Kisatchie National Forest. The United States acquired the lands under the Weeks Forestry Act[14] through nine acts of sale and two judgments in condemnation.[15] Each of these eleven conveyances came after the six transactions in which Bodcaw Lumber and Grant Timber conveyed mineral rights on the lands to Good Pine Oil. Consequently, at the time of acquisition, the approximately 180,000 acres of land that the United States acquired was burdened by 96 separate mineral servitudes in favor of Good Pine Oil.

The eleven instruments of transfer (nine deeds and two judgments) conveying the lands to the United States addressed the pre-existing mineral servitudes in different ways. All but one of the instruments contained language stating that the conveyances were "subject to" one or more of the mineral deeds granting rights to Good Pine Oil. Most

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14. 16 U.S.C. § 515.

15. The record shows that the United States acquired the lands between November 28, 1934, and January 28, 1937.

of these transfer instruments contained an additional clause stating that the "mention" of the earlier mineral reservation was "made solely for the purpose of limiting vendor's warranty to the United States in present sale, and *the recital of the said Mineral Sale shall in nowise extend or enlarge the same in point of time.*"

Five of the instruments (four deeds and one judgment) also contained additional mineral reservations in the name of Bodcaw Lumber or Grant Timber, which were to become effective upon the prescription of the relevant servitudes held by Good Pine Oil. For example, the February 11, 1936 deed conveying 24,943.93 acres owned by Bodcaw Lumber "specially reserved" unto Bodcaw Lumber "all of the oil, gas and other minerals . . . subject to the sales to Good Pine Oil Company, Incorporated, for a period of ten years after the expiration of the rights of the said Good Pine Oil Company, Incorporated, under the laws of the State of Louisiana." This deed further provided that this "specially reserved" right would be extended beyond ten years if the right were exercised in a particular fashion, and that if the original ten year period or any extended period terminated for nonuse, "a complete fee in the land [would] become vested in the United States." The other four instruments also contained clauses granting reversionary mineral interests to Bodcaw Lumber or Grant Timber upon the prescription of the Good Pine servitudes.[16] Each of the instruments stated

16. Because the Good Pine servitudes were still in effect, the "reversionary" clauses were invalid. *See Liberty Farms v. Miller,* 45 So.2d 610, 614 (La.1950) ("One may not reserve reversionary rights to minerals when he is not the owner of the minerals at the

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that at the termination of the reservations, the United States would hold the land in "complete fee."

D. ***Act 315***

In 1940, well after the mineral and land transactions described above were complete, the Louisiana Legislature passed Act 315 to eliminate the rule of prescription for mineral rights on lands held by the United States:

> [W]hen land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America . . . , and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible.[17]

The purpose of the Act was to facilitate the federal government's purchase of large tracts of land for National Forests, National Parks, military installations, and like

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time the reservation is made. It is settled that, in such instances, the reservation is ineffective and the outstanding mineral interests revert to the person owning the land at the time prescription accrues.").

17. *See* 1940 La. Acts 315; *see also* La. R.S. § 31:149.

purposes.[18] The United States was having difficulty acquiring such tracts in Louisiana because landowners who wished to retain mineral rights were reluctant to sell their land for fear of losing mineral reservations through prescription.[19] By making mineral servitudes on federal land "imprescriptible"—and thus "prevent[ing] the federal government from acquiring mineral rights by prescription"—Act 315 also served Louisiana's interest in taxing and regulating minerals on federal land, powers that would be in doubt should ownership of the minerals be vested in the United States.[20]

E. *Nebo Oil*

In 1948, the United States filed a declaratory judgment action against the Nebo Oil Company to quiet title to the minerals on a particular servitude claimed by Nebo Oil as successor in interest to Good Pine Oil.[21] The complaint referred to a specific parcel, approximately 800 acres in size, lying in portions of section 19 (Township 13 North, Range 6 West) and section 24 (Township 13, Range 7 West) in

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18. *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 599 & n. 16 (1973) (citing *Leiter Minerals*, 132 So.2d at 851).

19. *Leiter Minerals*, 132 So.2d at 851.

20. *Id.* at 851-52, 854; *see also Little Lake Misere*, 412 U.S. at 599-600 (citing *Leiter Minerals*).

21. Sometime after December 1941, Nebo Oil Company acquired all of the mineral rights formerly held by Good Pine Oil. *See Nebo Oil*, 190 F.2d at 1006.

Natchitoches Parish. This parcel was one of several parcels acquired by the United States through a February 11, 1936 deed from Bodcaw Lumber, which totaled 24,943.93 acres. Nebo Oil claimed a mineral servitude on the 800-acre parcel as a result of a November 12, 1932 conveyance of mineral rights from Bodcaw to Good Pine Oil.

In its complaint, the United States averred: (1) that no drilling operations had been conducted on the 800-acre parcel during the ten year period beginning on November 12, 1932; (2) that the mineral servitude on the parcel had therefore prescribed for nonuse; and (3) that Nebo Oil intended to drill a well on the land and had advised the government that the company would resist interference. To prevent injury to its property, the United States sought declaratory relief and an order permanently enjoining Nebo Oil from entering the 800-acre parcel for mineral production.

In denying the United States relief, the District Court for the Western District of Louisiana held that the 800-acre servitude had been rendered "imprescriptible" by Act 315.[22] This court affirmed that judgment.[23] First, this court found

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22. *See United States v. Nebo Oil,* 90 F.Supp. 73 (W.D.La.1950).

23. *See Nebo Oil,* 190 F.2d at 1003. The district court's final decree in *Nebo Oil* included a broad finding that the prescriptive periods of the Louisiana Civil Code "do not apply to lands purchased by the United States under the Weeks Act, as amended, for national forest purposes. . . ." The court further found that "under the terms of the deed from Bodcaw Lumber . . . to Good Pine Oil . . . dated November 12, 1932, and the deed from Bodcaw Lumber . . . to the

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that it was bound by Louisiana precedent holding that rules of prescription, including Act 315, "are retrospective in their operation."[24] Second, we held that Act 315's elimination of the rule of prescription as to servitudes on federal land did not dispose of federal property in violation of Article IV, Section 3, clause 2 of the United States Constitution or violate the Contract Clause of the Constitution or the Due Process Clause of the Fourteenth Amendment. The apparent reasoning was that the United States's interest in reclaiming the mineral rights through prescription was not a vested right at the time Act 315 was passed because the Good Pine servitudes had been created less than ten years earlier.[25]

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United States of America dated February 11, 1936, the oil, gas and sulphur in, on and under the lands conveyed to the United States under such deed . . . , which deed covered the lands herein involved, were vested in perpetuity in Good Pine Oil . . . , its successors and assigns, and, through it, in the defendant herein, as its successor in interest." Despite the breadth of these findings, the district court returned to the property that was actually before it when it concluded its decree: "IT IS NOW ORDERED, ADJUDGED AND DECREED that the oil, gas, and sulphur in, on and under the lands described in the complaint are vested in perpetuity in Nebo Oil Company, Inc., its successors and assigns."

24. *See Nebo Oil,* 190 F.2d at 1008 (citing *Whitney Nat'l Bank of New Orleans v. Little Creek Oil Co.,* 212 La. 949, 33 So.2d 693 (1947)).

25. *See id.* at 1008-10; *see also id.* at 1008 ("It cannot be considered a vested right if it is nothing more than a mere expectation, or hope, based upon an anticipated continuance of the applicable general laws.").

F. *After Nebo Oil*

Subsequent to our decision in *Nebo Oil,* there were two decisions concerning the retroactive applicability of Act 315 to mineral servitudes located on property owned by the United States. First, in *United States v. Little Lake Misere Land Company,* the government sued to quiet title in two adjacent parcels of land in Cameron Parish, Louisiana, which it had acquired under the Migratory Bird Conservation Act.[26] The instruments of acquisition—a 1937 deed and a 1939 judgment in condemnation—reserved to Little Lake Misere oil, gas, sulphur, and other minerals for a period of ten years from the date of vesting of title in the United States.[27] But those instruments further provided that if the initial ten year period ended and no production was occurring, or if operations subsequently ceased for more than sixty days, "the right to mine, produce and market said oil, gas, sulphur or other mineral shall terminate . . . and the complete fee title to said lands shall thereby become vested in the United States."[28] Nevertheless, following the enactment of Act 315, the servitude holder, Little Lake Misere, asserted that the reservations had become "imprescriptible."

In a brief per curiam opinion, this court held in favor of the servitude holder, finding that the contractual terms of prescription did not apply to the servitudes in question in

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26. 412 U.S. at 582.

27. *Id.*

28. *Id.* at 583.

the light of Act 315.[29] This holding was based on our prior decision in *Nebo Oil* regarding the constitutionality of the retroactive application of Act 315.[30]

But the United States Supreme Court granted certiorari and reversed.[31] In so doing, the Court did not expressly reject our interpretation of Louisiana law or the analysis of Act 315's constitutionality in *Nebo Oil.* Instead, invoking the choice-of-law doctrine of *Clearfield Trust Co. v. United States,*[32] the Supreme Court held that this court erred in presuming, as a threshold matter, that Louisiana state law applied.[33] Furthermore, because *Little Lake Misere* involved a determination of rights under a land acquisition agreement that was "explicitly authorized, though not precisely governed, by the Migratory Bird Conservation Act" and "to which the United States itself is a party," the Supreme Court held that it was for the federal courts to "fashion" the governing rule of law in that case.[34] Determining that Act 315 would deprive the United States of "bargained-for-

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29. *See United States v. Little Lake Misere Land Co.,* 453 F.2d 360 (5th Cir.1971).

30. *Id.* at 362.

31. *See United States v. Little Lake Misere Land Co.,* 318 U.S. 363 (1943).

32. 318 U.S. 580 (1943).

33. *See Little Lake Misere,* 412 U.S. at 591.

34. *See id.* at 594.

contractual interests" by abrogating the terms of the acquisition instruments relating to prescription, the Supreme Court held that the Act was "plainly hostile to the interests of the United States" and could not be "borrowed" as the rule of decision.[35] Finally, the Supreme Court held that the appropriate rule of decision was to be supplied by either federal common law or "residual" state law (*i.e.*, state law without Act 315), both of which would give effect to the contract terms.[36]

The second decision pertinent here was *Central Pines Land Company v. United States.*[37] In that case, we were called upon to revisit our *Nebo Oil* ruling in the light of the Supreme Court's opinion in *Little Lake Misere.*[38] The facts of *Central Pines* were quite similar to those of *Nebo Oil.* First, like *Nebo Oil, Central Pines* involved the acquisition of land by the United States in the 1930s for the Kisatchie National Forest.[39] Second, also like *Nebo Oil,* the lands so acquired were subject to a preexisting mineral servitude.[40] Finally, the successor in interest to the servitude owner also argued that Act 315 had rendered the servitude in *Central Pines* "imprescriptible."[41]

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35. *Id.* at 596.

36. *Id.* at 604.

37. 274 F.3d 881.

38. 274 F.3d at 881.

39. *See id.* at 885.

40. *Id.*

41. *Id.* at 886.

Despite the factual similarities between *Central Pines* and *Nebo Oil,* and perhaps taking a cue from the Supreme Court's *Little Lake Misere* decision, this court ruled that Act 315 did not apply to *Central Pines.*[42] While we declined to expressly overrule *Nebo Oil*'s constitutional analysis, we also rejected the presumption in *Nebo Oil* that Louisiana law governed the terms of the transactions at issue.[43] In particular, following the analysis of *Little Lake Misere,* this court held that the right asserted by the United States—*i.e.,* the right to reclaim mineral interests through prescription—was a right acquired through a duly authorized federal land acquisition agreement and, therefore, that federal choice-of-law principles applied.[44]

Applying these principles, the *Central Pines* court determined that Act 315 could not be borrowed as the rule of decision because, as in *Little Lake Misere,* it was hostile to the government's contractual interests in reclaiming minerals through the "legal rules in place at the time of contract."[45] While acknowledging that this interest was "arguably not as powerful as the federal right to enforce explicit contractual terms" (the right at stake in *Little Lake Misere*), we determined that this interest outweighed any state interest in applying Act 315.[46] Noting that the "main

42. 274 F.3d at 886.

43. *Id.* at 889-90.

44. *Id.* at 888-90.

45. *Id.* at 891.

46. *Id.* at 891-92.

justification" for Act 315 was to facilitate federal land acquisitions, this court observed that "[such] justification has no bearing on retroactive application of Act 315, because an acquisition cannot be facilitated by a law not yet in existence."[47] Finally, in recognition of the federal interest in the general rule of prescription, we also determined that the proper rule of decision was "residual" state law, *i.e.*, Louisiana law without Act 315.[48]

G. *The Present Dispute*

In the 1990s, the United States began granting mineral leases on certain Forest Service lands that had been burdened by Good Pine servitudes but were not involved in *Nebo Oil.* The government regarded these servitudes as prescribed for ten years' nonuse. In determining that the servitudes were subject to the rule of prescription, rather than Act 315, the United States relied on the Supreme Court's ruling in *Little Lake Misere.*

In response to this leasing activity, the Plaintiffs, who are successors in interest to Nebo Oil Company, initiated this declaratory judgment action on February 18, 2000. Their complaint named the United States and various parties to whom the United States granted mineral leases or offers to lease on lands that are or were burdened by Good Pine servitudes as defendants. Plaintiffs sought a ruling declaring that they are the owners, in perpetuity, of those servitudes

47. *Id.* at 892 (citing *Little Lake Misere,* 412 U.S. at 599).

48. *Id.*

and that the mineral leases and offers to lease issued by the United States were therefore null and void. The United States argued in response to the Plaintiffs' complaint that the 95 separate mineral servitudes through which the Plaintiffs claim mineral rights are subject to prescription for nonuse and that the relevant leases and offers to lease relate to lands on which the servitudes claimed by Plaintiffs have already prescribed.

Plaintiffs filed a motion for summary judgment[49] in the district court. In their motion, Plaintiffs argued that they were entitled to judgment as a matter of law because *Nebo Oil* and the doctrine of *res judicata* or collateral estoppel[50] would

49. Plaintiffs actually filed two motions for summary judgment. In their second summary judgment motion, Plaintiffs argued that even if the rule of prescription applied, five servitudes burdening nearly seventy percent of the 180,000 acres in dispute had not prescribed because they had exercised their rights through continuous drilling operations. The United States conceded that sufficient drilling operations had interrupted the running of prescription on some of the servitudes and introduced evidence regarding the particular histories of each of the 96 Good Pine servitudes. But the district court dismissed this second motion as moot due to its *res judicata* determination and expressly declined to consider the issue of whether sufficient drilling operations interrupted the prescriptive period as to any particular servitude. Because we reverse the district court's grant of summary judgment and because the district court has not had an opportunity to pass on the question of what servitudes may have prescribed, we will not reach the merits of Plaintiffs' second motion and remand this issue to the district court.

50. Although Plaintiffs did not specifically use the term "collateral estoppel" in their motion for summary judgment, Plaintiffs' argument in favor on the motion was based on *res judicata*. "The rules of *res judicata* encompass two separate but linked

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bar any defense raised by the United States as to the prescriptibility of the servitudes. The United States opposed the Plaintiffs' motion for summary judgment.

H. *The District Court's Ruling*

On December 18, 2001, the district court issued a memorandum ruling granting the Plaintiffs' motion for summary judgment. Holding that *res judicata* barred the United States's asserted defenses to Plaintiffs' claim of ownership due to this court's decision in *Nebo Oil,* the district court declared that Plaintiffs were "the exclusive owners in perpetuity of the approximately 180,000 acres of mineral servitudes at issue in this case." The district court based its ruling on this court's decision in *Nebo Oil.* The court noted that the 800-acre servitude addressed in *Nebo Oil* burdened a parcel of land that the United States acquired in 1936 as part of a larger purchase of 24,943.93 acres and that all 24,943.93 acres were burdened by mineral servitudes that were owned in common with the 800-acre servitude. Because the *Nebo Oil* decision referred to the 24,943.93-acre transaction, the district court found that *Nebo Oil* "applied Act 315 of 1940 to the mineral reservation and sale of the 24,943.93 acre tract" and that "*res judicata* clearly applies" to disputes over the minerals on this tract.

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preclusive doctrines: (1) true *res judicata* or claim preclusion and (2) collateral estoppel or issue preclusion." *See St. Paul Mercury Ins. Co. v. Williamson,* 224 F.3d 425, 436 (5th Cir.2002) (internal citation omitted). Because these two doctrines are separate, collateral estoppel will be analyzed separately in this opinion.

As for the remainder of the approximately 180,000 acres of land—acquired by the United States in ten additional transactions that were not specifically addressed in *Nebo Oil*—the district court found that *res judicata* was also applicable due to the factual similarity in the transactions. Specifically, because of the similarities in the transactions through which the United States acquired the lands and in the earlier transactions creating mineral servitudes on the land, the district court stated: (1) that "the entire 180,000 acres was similarly situated to the 800 acres at issue in *Nebo Oil*"; (2) that the United States had a "full and fair opportunity" (in *Nebo Oil*) to "litigate the application and constitutionality of Louisiana Act 315 to this mineral property"; and (3) that "[t]he government should not be allowed to litigate now that which it could have litigated 50 years ago."

Accordingly, the district court entered a final judgment on May 29, 2002. The United States timely appealed.

II. Analysis

The critical issue before this court focuses on whether the United States is precluded from challenging Plaintiffs' assertion of ownership over all 96 of the mineral servitudes arising from their status as successors in interest to Good Pine Oil. Because the district court granted summary judgment, we review that decision *de novo*.[51]

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51. *Central Pines*, 274 F.3d at 886.

Appendix A

A. *Res Judicata-A Claim Precluded by Sameness?*

"Claim preclusion, or *res judicata,* bars the litigation of claims that either have been litigated or should have been raised in an earlier suit."[52] The test for *res judicata* has four elements: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.[53] In this case, there is no dispute over the competency of the *Nebo Oil* court, the finality of its judgment in that case, or the sameness of the parties. The only dispute is whether this case involves the same claim or cause of action as *Nebo Oil.*

To determine whether two suits involve the same claim or cause of action, this court has adopted the transactional test of the Restatement (Second) of Judgments, § 24.[54] Under that test, the preclusive effect of a prior judgment extends to all rights the original plaintiff had "with respect to all or any

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52. *In re Southmark Corp.,* 163 F.3d 925, 934 (5th Cir.1999). *See Brown v. Felsen,* 442 U.S. 127, 131 (1979) ("*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.").

53. *Southmark,* 163 F.3d at 934.

54. *Id.* (citing *Southmark Properties v. Charles House Corp.,* 742 F.2d 862, 870-71 (5th Cir.1984)).

part of the transaction, or series of connected transactions, out of which the [original] action arose."[55]

> What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.[56]

"[T]he critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts.*"[57]

Contending that this action is not based on the same nucleus of operative facts as the action in *Nebo Oil,* the United States points out that it initiated the *Nebo Oil* litigation in response to learning that Nebo Oil intended to conduct drilling operations on a particular 800-acre parcel of federal land under a mineral servitude that, in the view of the United States, had prescribed.[58] The operative facts of that

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55. Restatement (Second) of Judgments § 24(1) (1982).

56. *Id.* § 24(2).

57. *Southmark,* 163 F.3d at 934 (internal quotation and citation omitted).

58. The United States acknowledges that it is precluded, as a matter of *res judicata,* from re-litigating title to the 800-acre mineral servitude at issue in *Nebo Oil.*

action included: (1) the United States's purchase of the 800-acre parcel from Bodcaw Lumber on February 11, 1936; (2) the creation of the mineral servitude burdening that parcel in a November 11, 1932 conveyance from Bodcaw Lumber to Good Pine Oil; and, most importantly, (3) the history of use or nonuse of that servitude. In contrast, the United States argues that the rights asserted by the parties in this case depend on ten additional federal land acquisitions, five additional mineral conveyances to Good Pine Oil, and the drilling histories on 95 additional servitudes.

The district court found that it did not "need to delve into such matters as what constitutes contiguous tracts, the number of servitudes, and whether prescription of nonuse was interrupted by good faith operations for the discovery and production of minerals." The district court reasoned that it was "faced with what may be viewed as a primarily legal question." Because all of the Good Pine servitudes were similarly situated with respect to application of Act 315, the court did not expressly identify the operative facts of this case and *Nebo Oil* and determine that they were the same. Instead, the district court relied on the fact that *Nebo Oil* addressed a federal land acquisition and the similarity among that acquisition and the other ten acquisitions at issue here.

But the district court's reliance on the factual similarities among the various servitudes and land acquisitions was misplaced. As the United States correctly points out, these observations of factual similarity, although potentially relevant for purposes of collateral estoppel, are not relevant to *res judicata*. Collateral estoppel prevents parties from re-litigating the same issues conclusively determined between them in a previous action. Although similar in principle, true

res judicata is concerned with a sameness of operative facts. Neither the Plaintiffs nor the district court have identified a principle of *res judicata* that requires an owner of separate properties to litigate title to all of those properties in response to a threat to his right of full use and enjoyment of only one of them.[59] While an action to quiet title in one property may raise the same legal issues that would also be in question in an similar type of action involving a similarly situated property, the operative facts of the two actions would be distinct.

In this case, each of the Good Pine servitudes was a distinct real right under Louisiana law.[60] The *Nebo Oil* action involved one servitude burdening an 800-acre parcel of land and was filed in response to a threat to the United States's asserted right of full use and enjoyment of that land. The United States took the position that the servitude was subject to prescription and had prescribed, and therefore it had to show ten years' nonuse *of that particular servitude* to succeed on its claim. The existence and use histories of the

59. Like the district court, the Plaintiffs seize on the Supreme Court's statement in *Nevada v. United States*, 463 U.S. 110, 129 n. 10 (1983), that "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water." While this is certainly true, nothing in the *Nevada* opinion undermines the principle that the doctrine of res judicata does not bar a second action unless it is the "same cause of action" as the first one. *See id.* at 130 ("To determine the applicability of *res judicata* to the facts before us, we must decide first if the 'cause of action' which the Government now seeks to assert is the 'same cause of action' that was asserted [previously].").

60. *See* McDougal, *supra* note 4, at 1099.

other Good Pine servitudes were not operative facts of either the government's claim or Nebo Oil's defense to that claim. Although the reasoning of *Nebo Oil* that the Good Pine servitudes were imprescriptible due to Act 315-made the use histories irrelevant as a matter of law, each servitude remained a distinct real right. If *Nebo Oil* remains good law, this court's holding that Act 315 rendered the Good Pine servitudes imprescriptible is final and conclusive between the United States and the Plaintiffs as a matter of collateral estoppel. But *res judicata* is no bar to the United States's defense in this action because its claim with respect to each servitude depends on a unique set of operative facts. Thus, if the United States's defense of this action is limited, it would be limited only under collateral estoppel.

B. *Collateral Estoppel-An Issue Precluded by Prior Litigation?*

Collateral estoppel precludes a party from litigating an issue already raised in an earlier action between the same parties[61] only if: (1) the issue at stake is identical to the one involved in the earlier action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action was a necessary part of the judgment in that action.[62] In this circuit, collateral estoppel applies to

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61. "Mutuality" is a prerequisite only when the party to be estopped is the United States. *See United States v. Mendoza*, 464 U.S. 154 (1984).

62. *Stripling v. Jordan Prod. Co.*, LLC, 234 F.3d 863, 868 (5th Cir.2000).

"pure questions of law" only when there has been no "change in controlling legal principles."[63] The United States contends that collateral estoppel does not apply in the present case because it seeks to raise issues that are not identical to the issues litigated in *Nebo Oil* and, in any event, there has been a change in controlling legal principles. We agree.

In ruling that the United States is precluded from re-litigating the applicability of Act 315 to the Good Pine servitudes, the district court did not specify what particular issues were actually litigated in *Nebo Oil.* But, as the United

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63. *See, e.g., Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1167 (5th Cir.1981) (discussing the effect of *Montana v. United States*, 440 U.S. 147 (1979) on the exception to collateral estoppel explained in *United States v. Sunnen*, 333 U.S. 591 (1948), and concluding that post-*Montana*, *Sunnen* stands only for the proposition that "estoppel would not apply where there had been a change in controlling legal principles between the two decisions."); *EEOC v. Am. Airlines, Inc.*, 48 F.3d 164, 170 (5th Cir.1995) (quoting *Montana*, 440 U.S. at 161, for the proposition that "a significant change in the legal climate may defeat collateral estoppel where modifications in controlling legal principles . . . could renders a previous determination inconsistent with the prevailing doctrine."); *RecoverEdge, L.P. v. Pentecost*, 44 F.3d 1284, 1291 (5th Cir.1995) (stating "As one treatise points out, however, 'courts have readily perceived that for purposes of preclusion, 'issues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits is the same,'" citing 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4417, at 165 (footnote omitted) (quoting *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291 (9th Cir. 1971); *Brister v. A.W.I.*, 946 F.2d 350, 354 n. 1 (5th Cir. 1991) (explaining that "not only the facts, but also the legal standard used to assess them, must be identical" and citing *Southern Pac. Transp. Co. v. Smith Material Corp.*, 616 F.2d 111, 115 (5th Cir.1980)).

States discusses in its brief, the question of Act 315's applicability to this case can be divided into three distinct sets of legal issues. First, there are threshold choice-of-law issues, including whether the rights arising out of the federal land acquisitions are governed by state law (including Act 315) or by federal law, and, if federal law governs, whether and what provisions of state law should be "borrowed" to provide the rules of decision.[64] Second, there are issues regarding the interpretation of Act 315 under state law, including the question whether Act 315 is to be applied retroactively. Finally, there are issues concerning whether applying Act 315 retroactively is constitutional. That these issues are distinct legal issues cannot be doubted after this court's ruling in *Central Pines*.[65]

Nebo Oil only addressed the latter two sets of issues.[66] That is, in *Nebo Oil,* this court assumed the applicability of Act 315, confined its analysis to an interpretation of the Act under state law, and determined that the Act did not violate the federal constitution.[67] In the present case, the United States does not seek to revisit the issues actually addressed in *Nebo Oil.* Instead, it seeks to raise the threshold choice-of-law issue that *Nebo Oil* did not address because it

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64. *See Little Lake Misere,* 412 U.S. at 590-604; *Central Pines,* 274 F.3d at 887-92.

65. *See* 274 F.3d at 889-90.

66. *See id.* (describing the scope of *Nebo Oil*).

67. *See id.*

was presumed. In particular, the United States contends that: (1) federal law governs the rights arising out of its acquisition of the lands at issue in this case;[68] (2) Act 315 may not be borrowed as the rule of decision because it is hostile to the United States's contractual interests;[69] and (3) the rule at the time of the contract (*i.e.*, the Louisiana rule of prescription) should govern.[70]

Because these questions of law are not "identical" to the issues raised in *Nebo Oil* and were not "actually litigated" in *Nebo Oil*, we find that the United States is not precluded, under collateral estoppel, from raising them in this case.[71] Although the Plaintiffs cite scattered portions of both the district court's opinion and the United States's brief in *Nebo Oil* in an effort to show that the choice-of-law issue was determined in that action, we stand by our prior finding in *Central Pines* that it was not.[72]

Nevertheless, even if the choice-of-law issue had been raised in *Nebo Oil*, changes in the controlling legal principles prevent the United States from being precluded from

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68. *See Little Lake Misere*, 412 U.S. at 594; *Central Pines*, 274 F.3d at 887-90.

69. *See Central Pines*, 274 F.3d at 890-92.

70. *See id.* at 892.

71. *RecoverEdge L.P. v. Pentecost*, 44 F.3d at 1290.

72. *See* 274 F.3d at 889-90.

litigating the issue in this case.[73] After the decisions in *Little Lake Misere* and *Central Pines,* it is clear that federal law governs the choice-of-law decision presented by the facts of this case. Hence, we are prohibited from borrowing Act 315 as the federal rule of decision because it is hostile to the federal interests at stake.[74]

III. Conclusion

Because neither *res judicata* nor collateral estoppel preclude the United States from challenging Plaintiffs' assertion of ownership over the mineral servitudes in question, we reverse the district court's grant of summary judgment. In addition, we find that the 95 servitudes that were not at issue in *Nebo Oil* are subject to the contractual provisions permitting prescription after ten years' nonuse. Accordingly, we remand this case so that the district court can determine which servitudes have in fact prescribed.

REVERSED AND REMANDED.

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73. The Plaintiffs' argument that the Supreme Court's decision in *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984), compels a contrary conclusion is mistaken. In that case, there had been no change in controlling legal principles between the first and the second action. *See id.* at 170. The Court was concerned, instead, with the exception to the otherwise applicable rules of preclusion for "unmixed questions of law" arising in "successive actions involving unrelated subject matter." *See id.* The United States does not rely on this exception in this case.

74. *See Central Pines*, 274 F.3d at 888-90.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 31, 2004

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 02-30760 c/w
02-30786

PETRO-HUNT, L.L.C.; et al.,

Plaintiffs-Appellees,

VERSUS

UNITED STATES OF AMERICA, et al.,

Defendants,

UNITED STATES OF AMERICA,

Defendant-Appellant.

PETRO-HUNT, L.L.C., et al.,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

Appendix B

Appeals from the United States District Court
for the Western District of Louisiana

Before EMILIO M. GARZA and DENNIS, Circuit Judges, and VANCE*, District Judge.

DENNIS, Circuit Judge:

Petro-Hunt, L.L.C., Hunt Petroleum Corporation, and Kingfisher Resources, Inc., (collectively "Plaintiffs") filed a declaratory judgment action seeking to quiet title to mineral rights in approximately 180,000 acres of federally owned land within the Kisatchie National Forest. Plaintiffs claim those rights as successors in interest to 96 mineral servitudes that were created before the United States purchased the land in the 1930s. The district court granted summary judgment in favor of Plaintiffs on the grounds of *res judicata* and denied Plaintiff's request for attorneys' fees. The United States timely appeals the district court's grant of summary judgment and Plaintiffs cross-appeal on the issue of attorneys' fees. Because we reverse district court's summary judgment ruling and remand for further proceedings not inconsistent with this opinion, we need not reach the merits of Plaintiffs' cross appeal regarding attorneys' fees since plaintiffs are no longer prevailing parties.[1]

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* District Judge of the Eastern District of Louisiana, sitting by designation.

1. Prevailing party status is a prerequisite to recovering attorneys' fees under 28 U.S.C. § 2412(b).

Appendix B

I. BACKGROUND

In order to give the proper context to our discussion of the merits of this factually dense case, we begin with a brief discussion on Louisiana mineral law, the servitudes in question, and the applicability of certain Louisiana laws to property owned by the United States.

A. *Mineral Servitudes Under Louisiana Law*

Louisiana law governing mineral servitudes does not recognize a separate mineral estate in oil and gas.[2] Mineral rights can be owned separate from the surface land only in the form of a mineral servitude.[3] Hence, any attempt to sell or reserve the ownership of oil and gas results in the creation of a mineral servitude, and the holder of that servitude has the right to enter the property and extract the minerals.[4] Louisiana law has long provided that a mineral servitude is extinguished by prescription resulting from ten years'

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2. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207, 243-245 (La. 1920).

3. *Central Pines Land Co. v. United States*, 274 F.3d 881, 884 (5th Cir. 2001).

4. *Central Pines*, 274 F.3d at 884. *See* La. R.S. § 31:21 ("A mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership."); *see also* Luther L. McDougal, III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1098-99 (1987).

nonuse.[5] The period of prescription on mineral servitudes begins to run on the date a servitude is created,[6] and is interrupted only by "good faith operations for the discovery and production of minerals."[7]

Because the rule of prescription reflects a public policy favoring "the timely return of outstanding minerals to the owner of the land,"[8] the rule may not be abrogated by contract.[9] The Louisiana Supreme Court has declared that "it is against the public policy of this state to allow ... servitudes to remain alive for a longer period than 10 years without use," and that any contracts to the contrary are void as against public policy.[10]

B. ***Creation of Mineral Servitudes***

In 1932, five Louisiana lumber companies—Good Pine Lumber, Trout Creek Lumber, Tall Timber Lumber, Bodcaw

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5. *Central Pines*, 274 F.3d at 884. *See* La. R.S. § 31:27.

6. *See* La. R.S. § 31:28; *see also Ober v. Williams*, 35 So.2d 219, 224 (1948).

7. La. R.S. § 31:29.

8. *See Mire v. Hawkins*, 186 So.2d 591, 597 (1966).

9. *See Leiter Minerals, Inc. v. California Co.*, 132 So.2d 845, 853 (1961). On the other hand, agreements to shorten the period of prescription do not conflict with public policy and are valid. *Id.*

10. *Id.*

Lumber, and Grant Timber—entered an agreement to pool the mineral rights on their respective land holdings in central Louisiana.[11] As part of the pooling agreement, the companies created a joint venture called the "Good Pine Oil Company" and separately conveyed to that company the rights to explore and develop their property for the production of oil, gas, and sulphur.[12] Of these conveyances, six that Bodcaw Lumber and Grant Timber made to Good Pine Oil between November 12, 1932, and May 3, 1934, are relevant to this case. All of these six conveyances involved multiple parcels of land, many of which were non-contiguous, and thus resulted in multiple mineral servitudes.[13]

Each of the six deeds conveying mineral rights to Good Pine Oil contained a clause providing that the ten year period of liberative prescription applied. Five of the deeds expressly stipulated that "none of said [mineral] rights in any of said lands shall be prescribed *unless there shall elapse a full period of ten (10) years in which there shall be no exercise of any of the foregoing rights or user of any of the lands* aforesaid under and by virtue hereof." The sixth contained

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11. *United States v. Nebo Oil*, 190 F.2d 1003, 1005 (5th Cir.1951).

12. *Id.*

13. *See Cox v. Sanders*, 421 So.2d 869, 873 (La. 1982) (stating that "a landowner cannot create a single servitude or mineral royalty right on two or more non-contiguous tracts; and if this is attempted by a single instrument, there are nevertheless as many servitudes or royalty interests as there are non-contiguous tracts of land" and quoting *Whitehall Oil Co. v. Heard*, 197 So.2d 672, 675 (La.Ct.App.1967)).

strikingly similar language. Because the prescriptive period described in these instruments is equivalent to the liberative prescription period of ten years, the contract provision applying a prescriptive period of ten years is enforceable.

C. *Acquisition by the United States*

In the late 1930s, the United States acquired approximately 180,000 acres of land in three Louisiana parishes (Grant Parish, Natchitoches Parish, and Winn Parish) from Bodcaw Lumber and Grant Timber for inclusion in the Kisatchie National Forest. The United States acquired the lands under the Weeks Forestry Act[14] through nine acts of sale and two judgments in condemnation.[15] Each of these eleven conveyances came after the six transactions in which Bodcaw Lumber and Grant Timber conveyed mineral rights on the lands to Good Pine Oil. Consequently, at the time of acquisition, the approximately 180,000 acres of land that the United States acquired was burdened by 96 separate mineral servitudes in favor of Good Pine Oil.

The eleven instruments of transfer (nine deeds and two judgments) conveying the lands to the United States addressed the pre-existing mineral servitudes in different ways. All but one of the instruments contained language stating that the conveyances were "subject to" one or more of the mineral deeds granting rights to Good Pine Oil. Most

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14. 16 U.S.C. § 515.

15. The record shows that the United States acquired the lands between November 28, 1934, and January 28, 1937.

of these transfer instruments contained an additional clause stating that the "mention" of the earlier mineral reservation was "made solely for the purpose of limiting vendor's warranty to the United States in present sale, and *the recital of the said Mineral Sale shall in nowise extend or enlarge the same in point of time.*"

Five of the instruments (four deeds and one judgment) also contained additional mineral reservations in the name of Bodcaw Lumber or Grant Timber, which were to become effective upon the prescription of the relevant servitudes held by Good Pine Oil. For example, the February 11, 1936 deed conveying 24,943.93 acres owned by Bodcaw Lumber "specially reserved" unto Bodcaw Lumber "all of the oil, gas and other minerals . . . subject to the sales to Good Pine Oil Company, Incorporated, for a period of ten years after the expiration of the rights of the said Good Pine Oil Company, Incorporated, under the laws of the State of Louisiana." This deed further provided that this "specially reserved" right would be extended beyond ten years if the right were exercised in a particular fashion, and that if the original ten year period or any extended period terminated for nonuse, "a complete fee in the land [would] become vested in the United States." The other four instruments also contained clauses granting reversionary mineral interests to Bodcaw Lumber or Grant Timber upon the prescription of the Good Pine servitudes.[16] Each of the instruments stated

16. Because the Good Pine servitudes were still in effect, the "reversionary" clauses were invalid. *See Liberty Farms v. Miller,* 45 So.2d 610, 614 (La.1950) ("One may not reserve reversionary rights to minerals when he is not the owner of the minerals at the

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that at the termination of the reservations, the United States would hold the land in "complete fee."

D. ***Act 315***

In 1940, well after the mineral and land transactions described above were complete, the Louisiana Legislature passed Act 315 to eliminate the rule of prescription for mineral rights on lands held by the United States:

> [W]hen land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America . . . , and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible.[17]

The purpose of the Act was to facilitate the federal government's purchase of large tracts of land for National Forests, National Parks, military installations, and like

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time the reservation is made. It is settled that, in such instances, the reservation is ineffective and the outstanding mineral interests revert to the person owning the land at the time prescription accrues.").

17. *See* 1940 La. Acts 315; *see also* La. R.S. § 31:149.

purposes.[18] The United States was having difficulty acquiring such tracts in Louisiana because landowners who wished to retain mineral rights were reluctant to sell their land for fear of losing mineral reservations through prescription.[19] By making mineral servitudes on federal land "imprescriptible"—and thus "prevent[ing] the federal government from acquiring mineral rights by prescription"—Act 315 also served Louisiana's interest in taxing and regulating minerals on federal land, powers that would be in doubt should ownership of the minerals be vested in the United States.[20]

E. *Nebo Oil*

In 1948, the United States filed a declaratory judgment action against the Nebo Oil Company to quiet title to the minerals on a particular servitude claimed by Nebo Oil as successor in interest to Good Pine Oil.[21] The complaint referred to a specific parcel, approximately 800 acres in size, lying in portions of section 19 (Township 13 North, Range 6 West) and section 24 (Township 13, Range 7 West) in

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18. *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 599 & n. 16 (1973) (citing *Leiter Minerals*, 132 So.2d at 851).

19. *Leiter Minerals*, 132 So.2d at 851.

20. *Id.* at 851-52, 854; *see also Little Lake Misere*, 412 U.S. at 599-600 (citing *Leiter Minerals*).

21. Sometime after December 1941, Nebo Oil Company acquired all of the mineral rights formerly held by Good Pine Oil. *See Nebo Oil*, 190 F.2d at 1006.

Natchitoches Parish. This parcel was one of several parcels acquired by the United States through a February 11, 1936 deed from Bodcaw Lumber, which totaled 24,943.93 acres. Nebo Oil claimed a mineral servitude on the 800-acre parcel as a result of a November 12, 1932 conveyance of mineral rights from Bodcaw to Good Pine Oil.

In its complaint, the United States averred: (1) that no drilling operations had been conducted on the 800-acre parcel during the ten year period beginning on November 12, 1932; (2) that the mineral servitude on the parcel had therefore prescribed for nonuse; and (3) that Nebo Oil intended to drill a well on the land and had advised the government that the company would resist interference. To prevent injury to its property, the United States sought declaratory relief and an order permanently enjoining Nebo Oil from entering the 800-acre parcel for mineral production.

In denying the United States relief, the District Court for the Western District of Louisiana held that the 800-acre servitude had been rendered "imprescriptible" by Act 315.[22] This court affirmed that judgment.[23] First, this court found

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22. *See United States v. Nebo Oil,* 90 F.Supp. 73 (W.D.La.1950).

23. *See Nebo Oil,* 190 F.2d at 1003. The district court's final decree in *Nebo Oil* included a broad finding that the prescriptive periods of the Louisiana Civil Code "do not apply to lands purchased by the United States under the Weeks Act, as amended, for national forest purposes. . . ." The court further found that "under the terms of the deed from Bodcaw Lumber . . . to Good Pine Oil . . . dated November 12, 1932, and the deed from Bodcaw Lumber . . . to the

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that it was bound by Louisiana precedent holding that rules of prescription, including Act 315, "are retrospective in their operation."[24] Second, we held that Act 315's elimination of the rule of prescription as to servitudes on federal land did not dispose of federal property in violation of Article IV, Section 3, clause 2 of the United States Constitution or violate the Contract Clause of the Constitution or the Due Process Clause of the Fourteenth Amendment. The apparent reasoning was that the United States's interest in reclaiming the mineral rights through prescription was not a vested right at the time Act 315 was passed because the Good Pine servitudes had been created less than ten years earlier.[25]

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United States of America dated February 11, 1936, the oil, gas and sulphur in, on and under the lands conveyed to the United States under such deed . . . , which deed covered the lands herein involved, were vested in perpetuity in Good Pine Oil . . . , its successors and assigns, and, through it, in the defendant herein, as its successor in interest." Despite the breadth of these findings, the district court returned to the property that was actually before it when it concluded its decree: "IT IS NOW ORDERED, ADJUDGED AND DECREED that the oil, gas, and sulphur in, on and under the lands described in the complaint are vested in perpetuity in Nebo Oil Company, Inc., its successors and assigns."

24. *See Nebo Oil,* 190 F.2d at 1008 (citing *Whitney Nat'l Bank of New Orleans v. Little Creek Oil Co.,* 33 So.2d 693 (1947)).

25. *See id.* at 1008-10; *see also id.* at 1008 ("It cannot be considered a vested right if it is nothing more than a mere expectation, or hope, based upon an anticipated continuance of the applicable general laws.").

Appendix B

F. *After Nebo Oil*

Subsequent to our decision in *Nebo Oil,* there were two decisions concerning the retroactive applicability of Act 315 to mineral servitudes located on property owned by the United States. First, in *United States v. Little Lake Misere Land Company,* the government sued to quiet title in two adjacent parcels of land in Cameron Parish, Louisiana, which it had acquired under the Migratory Bird Conservation Act.[26] The instruments of acquisition—a 1937 deed and a 1939 judgment in condemnation—reserved to Little Lake Misere oil, gas, sulphur, and other minerals for a period of ten years from the date of vesting of title in the United States.[27] But those instruments further provided that if the initial ten year period ended and no production was occurring, or if operations subsequently ceased for more than sixty days, "the right to mine, produce and market said oil, gas, sulphur or other mineral shall terminate . . . and the complete fee title to said lands shall thereby become vested in the United States."[28] Nevertheless, following the enactment of Act 315, the servitude holder, Little Lake Misere, asserted that the reservations had become "imprescriptible."

In a brief per curiam opinion, this court held in favor of the servitude holder, finding that the contractual terms of prescription did not apply to the servitudes in question in

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26. 412 U.S. at 582.

27. *Id.*

28. *Id.* at 583.

the light of Act 315.[29] This holding was based on our prior decision in *Nebo Oil* regarding the constitutionality of the retroactive application of Act 315.[30]

But the United States Supreme Court granted certiorari and reversed.[31] In so doing, the Court did not expressly reject our interpretation of Louisiana law or the analysis of Act 315's constitutionality in *Nebo Oil.* Instead, invoking the choice-of-law doctrine of *Clearfield Trust Co. v. United States,*[32] the Supreme Court held that this court erred in presuming, as a threshold matter, that Louisiana state law applied.[33] Furthermore, because *Little Lake Misere* involved a determination of rights under a land acquisition agreement that was "explicitly authorized, though not precisely governed, by the Migratory Bird Conservation Act" and "to which the United States itself is a party," the Supreme Court held that it was for the federal courts to "fashion" the governing rule of law in that case.[34] Determining that Act 315 would deprive the United States of "bargained-for-

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29. *See United States v. Little Lake Misere Land Co.*, 453 F.2d 360 (5th Cir.1971).

30. *Id.* at 362.

31. *See United States v. Little Lake Misere Land Co.*, 318 U.S. 363 (1943).

32. 318 U.S. 580 (1943).

33. *See Little Lake Misere,* 412 U.S. at 591.

34. *See id.* at 594.

contractual interests" by abrogating the terms of the acquisition instruments relating to prescription, the Supreme Court held that the Act was "plainly hostile to the interests of the United States" and could not be "borrowed" as the rule of decision.[35] Finally, the Supreme Court held that the appropriate rule of decision was to be supplied by either federal common law or "residual" state law (*i.e.*, state law without Act 315), both of which would give effect to the contract terms.[36]

The second decision pertinent here was *Central Pines Land Company v. United States.*[37] In that case, we were called upon to revisit our *Nebo Oil* ruling in the light of the Supreme Court's opinion in *Little Lake Misere.*[38] The facts of *Central Pines* were quite similar to those of *Nebo Oil.* First, like *Nebo Oil, Central Pines* involved the acquisition of land by the United States in the 1930s for the Kisatchie National Forest.[39] Second, also like *Nebo Oil,* the lands so acquired were subject to a preexisting mineral servitude.[40] Finally, the successor in interest to the servitude owner also argued that Act 315 had rendered the servitude in *Central Pines* "imprescriptible."[41]

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35. *Id.* at 596.

36. *Id.* at 604.

37. 274 F.3d 881.

38. 274 F.3d at 881.

39. *See id.* at 885.

40. *Id.*

41. *Id.* at 886.

Appendix B

Despite the factual similarities between *Central Pines* and *Nebo Oil,* and perhaps taking a cue from the Supreme Court's *Little Lake Misere* decision, this court ruled that Act 315 did not apply to *Central Pines.*[42] While we declined to expressly overrule *Nebo Oil*'s constitutional analysis, we also rejected the presumption in *Nebo Oil* that Louisiana law governed the terms of the transactions at issue.[43] In particular, following the analysis of *Little Lake Misere,* this court held that the right asserted by the United States—*i.e.*, the right to reclaim mineral interests through prescription—was a right acquired through a duly authorized federal land acquisition agreement and, therefore, that federal choice-of-law principles applied.[44]

Applying these principles, the *Central Pines* court determined that Act 315 could not be borrowed as the rule of decision because, as in *Little Lake Misere,* it was hostile to the government's contractual interests in reclaiming minerals through the "legal rules in place at the time of contract."[45] While acknowledging that this interest was "arguably not as powerful as the federal right to enforce explicit contractual terms" (the right at stake in *Little Lake Misere*), we determined that this interest outweighed any state interest in applying Act 315.[46] Noting that the "main

42. 274 F.3d at 886.

43. *Id.* at 889-90.

44. *Id.* at 888-90.

45. *Id.* at 891.

46. *Id.* at 891-92.

justification" for Act 315 was to facilitate federal land acquisitions, this court observed that "[such] justification has no bearing on retroactive application of Act 315, because an acquisition cannot be facilitated by a law not yet in existence."[47] Finally, in recognition of the federal interest in the general rule of prescription, we also determined that the proper rule of decision was "residual" state law, *i.e.*, Louisiana law without Act 315.[48]

G. *The Present Dispute*

In the 1990s, the United States began granting mineral leases on certain Forest Service lands that had been burdened by Good Pine servitudes but were not involved in *Nebo Oil*. The government regarded these servitudes as prescribed for ten years' nonuse. In determining that the servitudes were subject to the rule of prescription, rather than Act 315, the United States relied on the Supreme Court's ruling in *Little Lake Misere*.

In response to this leasing activity, the Plaintiffs, who are successors in interest to Nebo Oil Company, initiated this declaratory judgment action on February 18, 2000. Their complaint named the United States and various parties to whom the United States granted mineral leases or offers to lease on lands that are or were burdened by Good Pine servitudes as defendants. Plaintiffs sought a ruling declaring that they are the owners, in perpetuity, of those servitudes

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47. *Id.* at 892 (citing *Little Lake Misere*, 412 U.S. at 599).

48. *Id.*

and that the mineral leases and offers to lease issued by the United States were therefore null and void. The United States argued in response to the Plaintiffs' complaint that the 95 separate mineral servitudes through which the Plaintiffs claim mineral rights are subject to prescription for nonuse and that the relevant leases and offers to lease relate to lands on which the servitudes claimed by Plaintiffs have already prescribed.

Plaintiffs filed a motion for summary judgment[49] in the district court. In their motion, Plaintiffs argued that they were entitled to judgment as a matter of law because *Nebo Oil* and the doctrine of *res judicata* or collateral estoppel[50] would

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49. Plaintiffs actually filed two motions for summary judgment. In their second summary judgment motion, Plaintiffs argued that even if the rule of prescription applied, five servitudes burdening nearly seventy percent of the 180,000 acres in dispute had not prescribed because they had exercised their rights through continuous drilling operations. The United States conceded that sufficient drilling operations had interrupted the running of prescription on some of the servitudes and introduced evidence regarding the particular histories of each of the 96 Good Pine servitudes. But the district court dismissed this second motion as moot due to its *res judicata* determination and expressly declined to consider the issue of whether sufficient drilling operations interrupted the prescriptive period as to any particular servitude. Because we reverse the district court's grant of summary judgment and because the district court has not had an opportunity to pass on the question of what servitudes may have prescribed, we will not reach the merits of Plaintiffs' second motion and remand this issue to the district court.

50. Although Plaintiffs did not specifically use the term "collateral estoppel" in their motion for summary judgment, Plaintiffs' argument in favor on the motion was based on *res judicata*. "The rules of *res judicata* encompass two separate but linked

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bar any defense raised by the United States as to the prescriptibility of the servitudes. The United States opposed the Plaintiffs' motion for summary judgment.

H. *The District Court's Ruling*

On December 18, 2001, the district court issued a memorandum ruling granting the Plaintiffs' motion for summary judgment. Holding that *res judicata* barred the United States's asserted defenses to Plaintiffs' claim of ownership due to this court's decision in *Nebo Oil,* the district court declared that Plaintiffs were "the exclusive owners in perpetuity of the approximately 180,000 acres of mineral servitudes at issue in this case." The district court based its ruling on this court's decision in *Nebo Oil.* The court noted that the 800-acre servitude addressed in *Nebo Oil* burdened a parcel of land that the United States acquired in 1936 as part of a larger purchase of 24,943.93 acres and that all 24,943.93 acres were burdened by mineral servitudes that were owned in common with the 800-acre servitude. Because the *Nebo Oil* decision referred to the 24,943.93-acre transaction, the district court found that *Nebo Oil* "applied Act 315 of 1940 to the mineral reservation and sale of the 24,943.93 acre tract" and that "*res judicata* clearly applies" to disputes over the minerals on this tract.

(Cont'd)

preclusive doctrines: (1) true *res judicata* or claim preclusion and (2) collateral estoppel or issue preclusion." *See St. Paul Mercury Ins. Co. v. Williamson,* 224 F.3d 425, 436 (5th Cir.2002) (internal citation omitted). Because these two doctrines are separate, collateral estoppel will be analyzed separately in this opinion.

As for the remainder of the approximately 180,000 acres of land—acquired by the United States in ten additional transactions that were not specifically addressed in *Nebo Oil*—the district court found that *res judicata* was also applicable due to the factual similarity in the transactions. Specifically, because of the similarities in the transactions through which the United States acquired the lands and in the earlier transactions creating mineral servitudes on the land, the district court stated: (1) that "the entire 180,000 acres was similarly situated to the 800 acres at issue in *Nebo Oil*"; (2) that the United States had a "full and fair opportunity" (in *Nebo Oil*) to "litigate the application and constitutionality of Louisiana Act 315 to this mineral property"; and (3) that "[t]he government should not be allowed to litigate now that which it could have litigated 50 years ago."

Accordingly, the district court entered a final judgment on May 29, 2002. The United States timely appealed.

II. Analysis

The critical issue before this court focuses on whether the United States is precluded from challenging Plaintiffs' assertion of ownership over all 96 of the mineral servitudes arising from their status as successors in interest to Good Pine Oil. Because the district court granted summary judgment, we review that decision *de novo*.[51]

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51. *Central Pines*, 274 F.3d at 886.

Appendix B

A. *Res Judicata-A Claim Precluded by Sameness?*

"Claim preclusion, or *res judicata*, bars the litigation of claims that either have been litigated or should have been raised in an earlier suit."[52] The test for *res judicata* has four elements: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.[53] In this case, there is no dispute over the competency of the *Nebo Oil* court, the finality of its judgment in that case, or the sameness of the parties. The only dispute is whether this case involves the same claim or cause of action as *Nebo Oil*.

To determine whether two suits involve the same claim or cause of action, this court has adopted the transactional test of the Restatement (Second) of Judgments, § 24.[54] Under that test, the preclusive effect of a prior judgment extends to all rights the original plaintiff had "with respect to all or any

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52. *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir.1999). *See Brown v. Felsen*, 442 U.S. 127, 131 (1979) ("*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.").

53. *Southmark*, 163 F.3d at 934.

54. *Id.* (citing *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870-71 (5th Cir.1984)).

part of the transaction, or series of connected transactions, out of which the [original] action arose."[55]

> What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.[56]

"[T]he critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts.*"[57]

Contending that this action is not based on the same nucleus of operative facts as the action in *Nebo Oil,* the United States points out that it initiated the *Nebo Oil* litigation in response to learning that Nebo Oil intended to conduct drilling operations on a particular 800-acre parcel of federal land under a mineral servitude that, in the view of the United States, had prescribed.[58] The operative facts of that

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55. Restatement (Second) of Judgments § 24(1) (1982).

56. *Id.* § 24(2).

57. *Southmark,* 163 F.3d at 934 (internal quotation and citation omitted).

58. The United States acknowledges that it is precluded, as a matter of *res judicata,* from re-litigating title to the 800-acre mineral servitude at issue in *Nebo Oil.*

action included: (1) the United States's purchase of the 800-acre parcel from Bodcaw Lumber on February 11, 1936; (2) the creation of the mineral servitude burdening that parcel in a November 11, 1932 conveyance from Bodcaw Lumber to Good Pine Oil; and, most importantly, (3) the history of use or nonuse of that servitude. In contrast, the United States argues that the rights asserted by the parties in this case depend on ten additional federal land acquisitions, five additional mineral conveyances to Good Pine Oil, and the drilling histories on 95 additional servitudes.

The district court found that it did not "need to delve into such matters as what constitutes contiguous tracts, the number of servitudes, and whether prescription of nonuse was interrupted by good faith operations for the discovery and production of minerals." The district court reasoned that it was "faced with what may be viewed as a primarily legal question." Because all of the Good Pine servitudes were similarly situated with respect to application of Act 315, the court did not expressly identify the operative facts of this case and *Nebo Oil* and determine that they were the same. Instead, the district court relied on the fact that *Nebo Oil* addressed a federal land acquisition and the similarity among that acquisition and the other ten acquisitions at issue here.

But the district court's reliance on the factual similarities among the various servitudes and land acquisitions was misplaced. As the United States correctly points out, these observations of factual similarity, although potentially relevant for purposes of collateral estoppel, are not relevant to *res judicata*. Collateral estoppel prevents parties from re-litigating the same issues conclusively determined between them in a previous action. Although similar in principle, true

res judicata is concerned with a sameness of operative facts. Neither the Plaintiffs nor the district court have identified a principle of *res judicata* that requires an owner of separate properties to litigate title to all of those properties in response to a threat to his right of full use and enjoyment of only one of them.[59] While an action to quiet title in one property may raise the same legal issues that would also be in question in an similar type of action involving a similarly situated property, the operative facts of the two actions would be distinct.

In this case, each of the Good Pine servitudes was a distinct real right under Louisiana law.[60] The *Nebo Oil* action involved one servitude burdening an 800-acre parcel of land and was filed in response to a threat to the United States's asserted right of full use and enjoyment of that land. The United States took the position that the servitude was subject to prescription and had prescribed, and therefore it had to show ten years' nonuse *of that particular servitude* to succeed on its claim. The existence and use histories of the

59. Like the district court, the Plaintiffs seize on the Supreme Court's statement in *Nevada v. United States*, 463 U.S. 110, 129 n. 10 (1983), that "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water." While this is certainly true, nothing in the *Nevada* opinion undermines the principle that the doctrine of res judicata does not bar a second action unless it is the "same cause of action" as the first one. *See id.* at 130 ("To determine the applicability of *res judicata* to the facts before us, we must decide first if the 'cause of action' which the Government now seeks to assert is the 'same cause of action' that was asserted [previously].").

60. *See* McDougal, *supra* note 4, at 1099.

other Good Pine servitudes were not operative facts of either the government's claim or Nebo Oil's defense to that claim. Although the reasoning of *Nebo Oil*—that the Good Pine servitudes were imprescriptible due to Act 315-made the use histories irrelevant as a matter of law, each servitude remained a distinct real right. If *Nebo Oil* remains good law, this court's holding that Act 315 rendered the Good Pine servitudes imprescriptible is final and conclusive between the United States and the Plaintiffs as a matter of collateral estoppel. But *res judicata* is no bar to the United States's defense in this action because its claim with respect to each servitude depends on a unique set of operative facts. Thus, if the United States's defense of this action is limited, it would be limited only under collateral estoppel.

B. *Collateral Estoppel-An Issue Precluded by Prior Litigation?*

Collateral estoppel precludes a party from litigating an issue already raised in an earlier action between the same parties[61] only if: (1) the issue at stake is identical to the one involved in the earlier action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action was a necessary part of the judgment in that action.[62] In this circuit, collateral estoppel applies to

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61. "Mutuality" is a prerequisite only when the party to be estopped is the United States. *See United States v. Mendoza,* 464 U.S. 154 (1984).

62. *Stripling v. Jordan Prod. Co.,* LLC, 234 F.3d 863, 868 (5th Cir. 2000).

"pure questions of law" only when there has been no "change in controlling legal principles."[63] The United States contends that collateral estoppel does not apply in the present case because it seeks to raise issues that are not identical to the issues litigated in *Nebo Oil* and, in any event, there has been a change in controlling legal principles. We agree.

In ruling that the United States is precluded from re-litigating the applicability of Act 315 to the Good Pine servitudes, the district court did not specify what particular issues were actually litigated in *Nebo Oil*. But, as the United States discusses in its brief, the question of Act 315's applicability to this case can be divided into three distinct sets of legal issues. First, there are threshold choice-of-law issues, including whether the rights arising out of the federal land acquisitions are governed by state law (including Act 315) or by federal law, and, if federal law governs, whether and what provisions of state law should be "borrowed" to provide the rules of decision.[64] Second, there are issues regarding the interpretation of Act 315 under state law, including the question whether Act 315 is to be applied retroactively. Finally, there are issues concerning whether applying Act 315 retroactively is constitutional. That these issues are distinct legal issues cannot be doubted after this court's ruling in *Central Pines*.[65]

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63. *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1214 (5th Cir. 1991).

64. *See Little Lake Misere*, 412 U.S. at 590-604; *Central Pines*, 274 F.3d at 887-92.

65. *See* 274 F.3d at 889-90.

Nebo Oil only addressed the latter two sets of issues.[66] That is, in *Nebo Oil,* this court assumed the applicability of Act 315, confined its analysis to an interpretation of the Act under state law, and determined that the Act did not violate the federal constitution.[67] In the present case, the United States does not seek to revisit the issues actually addressed in *Nebo Oil.* Instead, it seeks to raise the threshold choice-of-law issue that *Nebo Oil* did not address because it was presumed. In particular, the United States contends that: (1) federal law governs the rights arising out of its acquisition of the lands at issue in this case;[68] (2) Act 315 may not be borrowed as the rule of decision because it is hostile to the United States's contractual interests;[69] and (3) the rule at the time of the contract (*i.e.,* the Louisiana rule of prescription) should govern.[70]

Because these questions of law are not "identical" to the issues raised in *Nebo Oil* and were not "actually litigated" in *Nebo Oil,* we find that the United States is not precluded, under collateral estoppel, from raising them in this case.[71]

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66. *See id.* (describing the scope of *Nebo Oil*).

67. *See id.*

68. *See Little Lake Misere,* 412 U.S. at 594; *Central Pines,* 274 F.3d at 887-90.

69. *See Central Pines,* 274 F.3d at 890-92.

70. *See id.* at 892.

71. *RecoverEdge L.P. v. Pentecost,* 44 F.3d 1284, 1290 (5th Cir. 1995).

Although the Plaintiffs cite scattered portions of both the district court's opinion and the United States's brief in *Nebo Oil* in an effort to show that the choice-of-law issue was determined in that action, we stand by our prior finding in *Central Pines* that it was not.[72]

Nevertheless, even if the choice-of-law issue had been raised in *Nebo Oil,* changes in the controlling legal principles prevent the United States from being precluded from litigating the issue in this case.[73] After the decisions in *Little Lake Misere* and *Central Pines,* it is clear that federal law governs the choice-of-law decision presented by the facts of this case. Hence, we are prohibited from borrowing Act 315 as the federal rule of decision because it is hostile to the federal interests at stake.[74]

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72. *See* 274 F.3d at 889-90.

73. The Plaintiffs' argument that the Supreme Court's decision in *United States v. Stauffer Chem. Co.,* 464 U.S. 165 (1984), compels a contrary conclusion is mistaken. In that case, there had been no change in controlling legal principles between the first and the second action. *See id.* at 170. The Court was concerned, instead, with the exception to the otherwise applicable rules of preclusion for "unmixed questions of law" arising in "successive actions involving unrelated subject matter." *See id.* The United States does not rely on this exception in this case.

74. *See Central Pines,* 274 F.3d at 888-90.

III. Conclusion

Because neither *res judicata* nor collateral estoppel preclude the United States from challenging Plaintiffs' assertion of ownership over the mineral servitudes in question, we reverse the district court's grant of summary judgment. In addition, we find that the 95 servitudes that were not at issue in *Nebo Oil* are subject to the contractual provisions permitting prescription after ten years' nonuse. Accordingly, we remand this case so that the district court can determine which servitudes have in fact prescribed.

REVERSED AND REMANDED.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION FILED MAY 29, 2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION NO. 00-0303

JUDGE DONALD E. WALTER

MAGISTRATE JUDGE PAYNE

PETRO-HUNT L.L.C., ET AL.

VERSUS

UNITED STATES OF AMERICA, ET AL.

JUDGMENT

This cause came on to be heard by the Court by way of summary judgment pursuant to Rule 56 filed by plaintiffs, Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc., which motion was opposed by defendant, United States of America. The court will assume all other defendants, who were alleged lessees of the United States and whose title was dependent upon whatever title the United States had, also opposed the motion; including those defendants who have been defaulted for not responding. The following defendants did appear and file responsive pleadings; Aspect Resources, L.L.C.; Justiss Oil Company;

MB Exploration, L.L.C.; Palmer Petroleum, Inc.; Snyder Oil Corporation, a/k/a Santa Fe Snyder a/k/a Devon SFS; John P. Strang; UMC Petroleum Corp. and its successor Ocean Energy Resources; and Wheless TDL Exploration Co., Ltd. The following defendants have been placed in default by the clerk: Bayou Petroleum Company; First Texas Hydrocarbons, Inc.; Oscar C. Forland; Northstar Energy, L.L.C.; Howell R. Spear; Gulf Coast Oil & Gas Co.; J. Bradley Jeffreys and Energy Arrow Exploration, L.L.C.

The Court having examined the memoranda in support of plaintiffs' Motion for Summary Judgment as well as all affidavits and attachments thereto and the reply memoranda of defendants, and after having considered the law and for the reasons set forth in the Memorandum Ruling of this court in this matter dated December 18, 2001, the court is of the opinion that the Motion for Summary Judgment filed by plaintiffs based on the doctrine of *res judicata* is meritorious and should be granted;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the judgment be and is hereby entered in favor of plaintiffs, Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc., and against defendants, United States of America; Aspect Resources, L.L.C.; Justiss Oil Company; MB Exploration, L.L.C.; Palmer Petroleum, Inc.; Snyder Oil Corporation, a/k/a Santa Fe Snyder a/k/a Devon SFS; John P. Strang; UMC Petroleum Corp. and its successor Ocean Energy Resources; Wheless TDL Exploration Co., Ltd.; Bayou Petroleum Company; First Texas Hydrocarbons, Inc.; Oscar C. Forland; Northstar Energy, L.L.C.; Howell R. Spear; Gulf Coast Oil & Gas Co.; Bradley Jeffreys and Energy Arrow Exploration, L.L.C.

Appendix C

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs, as named hereinabove, are hereby declared to be the owners, in indivision, in perpetuity, of all of the mineral servitudes which are the subject of this suit being 180,117 mineral acres, more or less, which is described with particularity in the attached Exhibit "A" [intentionally omitted] hereto, which is incorporated herein by reference the same as if copied *in extenso*. Plaintiff, Petro-Hunt, L.L.C. is the owner in perpetuity of an undivided 64.28572 percent interest in the mineral servitudes described in Exhibit "A" [intentionally omitted] hereto; plaintiff Hunt Petroleum Corporation is the owner in perpetuity of an undivided 16.80672 percent interest in the mineral servitudes described in Exhibit "A" [intentionally omitted] hereto; and plaintiff Kingfisher Resources, Inc. is the owner in perpetuity of an undivided 18.90756 percent interest in the mineral servitudes described in Exhibit "A" [intentionally omitted] hereto.

IT IS ALSO ORDERED, ADJUDGED AND DECREED that as to the aforementioned ±180,117 acres described hereinabove, that the Louisiana law of prescription of mineral servitudes will not run, and will be tolled, for so long as the United States of America holds title to the surface of this said land per Louisiana Act 315 of 1940, now codified in Article 149 of the Louisiana Mineral Code. Based upon the Court's understanding that some third parties may claim title to various portions of the property described as Exhibit "A" [intentionally omitted], the Court holds that nothing contained in this judgment purports to adjudicate or affect rights ~~of such~~ third parties who are presently not before this Court.

Appendix C

IT IS ALSO ORDERED, ADJUDGED AND DECREED that all purported mineral leases issued by the United States of America on the ±180,117 acres described herein are hereby declared null and void, *ab initio*, and of no force and effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States of America is permanently enjoined from attempting to in any manner grant mineral leases in, on, or under the property listed in Exhibit "A" [intentionally omitted].

Plaintiff's Motion for Attorneys Fees was previously denied by the Court. Plaintiffs are awarded all taxable costs of these proceedings against defendant United States of America and judgment is hereby entered accordingly.

THUS DONE AND SIGNED at Shreveport, Louisiana this 29 day of May 2002.

s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

Judgment Entered
May 29, 2002

APPENDIX D — MEMORANDUM RULING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION FILED DECEMBER 18, 2001

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION NO. 00-0303

JUDGE DONALD E. WALTER

MAGISTRATE JUDGE PAYNE

PETRO-HUNT L.L.C., ET AL,

VERSUS

UNITED STATES OF AMERICA, ET AL.

MEMORANDUM RULING

Before this Court is a Motion for Summary Judgment [Doc. 85] and a Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment [Doc. 142], filed on behalf of the Plaintiff, Petro-Hunt, L.L.C., Hunt Petroleum Corporation, and Kingfisher Resources, Inc. (Petro-Hunt), pursuant to Federal Rule of Civil Procedure 56. Defendants, United States of America, et al., oppose the Motion [Doc. 133].[1] For the reasons assigned herein, Plaintiff's

1. The number and relationship of the co-defendants with the United States of America requires a comment. Though this Court is (Cont'd)

motion is GRANTED and Plaintiffs, Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc. are hereby declared the exclusive owners in perpetuity of the approximately 180,000 acres of mineral servitudes at issue in this case and being more fully described in Plaintiff's Complaint [Doc. 1].

(Cont'd)
not presented with any contractual disputes (cross-claims) between mesne defendants and the United States, the fate of certain leaseholds obtained by the various defendants hinges upon the ownership of the various mineral servitudes, which is distinctly at issue in this case. Article 114 of the Louisiana Mineral Code (La.R.S. § 31:114) states, "A mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals." Though the mineral lease has been characterized in a seemingly conflicting manner, as being both a real right and giving rise to a contractual relationship (*See* comment to La.Min.Code art. 16), none would dispute that a valid mineral lease must be originally obtained from a lessor having an executive or ownership interest in the underlying mineral rights (*See* La.Min.Code art. 116) or one who thereafter acquires such an interest (*See* La.Min.Code arts. 144 & 145). All named defendants claim to own rights as lessees (and likely also as assignees), which are dependant upon the United States, as lessor, ultimately having an executive or ownership interest in the mineral rights at issue. Such is evidenced by plaintiff's motion to pretermit entry of judgment by default against certain defendants other than the United States, until the Court settles the title dispute between it and the United States [Doc. 58] and by certain defendant's adoption by reference of the briefs of the United States [Docs. 123, 126 & 131]. Simply put, the various defendants interests are, for the moment, aligned with the United States and ultimately dependant upon the United States prevailing. Therefore, for clarity's sake, this Court will not delve into contractual relationships between the various defendants and the United States and, for purposes of this memorandum, will refer to and treat the defendant, as being the United States.

Appendix D

BACKGROUND

The case at bar cannot be properly framed without an examination of the Fifth Circuit's *United States v. Nebo Oil Co.*[2] opinion, as it provides both the historical backdrop and the grounds for Petro-Hunt's pivotal assertion of *res judicata* and/or claim preclusion.[3] This Court includes the following lengthy, but relevant, quotations because it reflects the view of a panel of judges much closer in time and in possession of the full record:

> This suit was brought by the appellant, United States of America, against the appellee, Nebo Oil Company, Inc., for a judgment declaring that appellant is the owner of the minerals . . . underlying approximately eight hundred acres of land located in the Parish of Natchitoches, States of Louisiana. A trial was had by the court without a jury and judgment was entered dismissing the complaint.
>
> The undisputed facts are these: In the year 1932 five lumber companies decided to pool the mineral rights in their lands in order to secure more favorable exploration and development thereof, it being agreed by the parties that each

2. 190 F.2d 1003 (5th Cir.1951).

3. While *res judicata* generally refers to claim preclusion, it is sometimes used when referencing issue preclusion. For purposes of this Memorandum, use of *res judicata* is synonymous with claim preclusion.

would share in any production obtained from the pooled acreage in proportion to the acreage which each lumber company contributed to the pool. For that purpose, the Good Pine Oil Company was organized. . . .

One of these conveyances to Good Pine Oil was by recorded deed from the Bodcaw Lumber Company, dated November 12, 1932, covering all of the oil, gas and sulphur underlying a tract of land containing 37, 532.13 acres of which the 800 acres of land here involved was a part.

Prior to the year 1936 the United States was interested in purchasing lands in Louisiana for national forest purposes and had found that owners of large tracts of land were unwilling to sell their lands because of court decisions holding that the sale or reservation of mineral rights in Louisiana created only a right in the nature of a servitude which was subject to prescription by ten years nonuser [sic]. However, the United States Department of Agriculture, Forest Service, was not in accord with this view and on May 29, 1935, submitted to Bodcaw Lumber Company an opinion of the Assistant Solicitor of the Department of Agriculture to the effect that the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for national forest purposes.

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Thereafter, on February 11, 1936, Bodcaw sold to the United States a tract of timber land containing 24,943.93 acres, of which the 800 acre tract whose minerals had previously been conveyed to Good Pine Oil formed a part. . . .

At the time the sale was made, the officers and directors of Bodcaw believed that the mineral rights in the lands sold were valuable and the price of $1.75 per acre paid by appellant for the timber lands acquired under the 1936 deed did not reflect the value of any mineral rights. Moreover, the uncontradicted testimony is that Bodcaw would not have sold the timber lands to the United States had its representatives then taken the position, as they do now, that the prescriptive provisions of the Louisiana Civil Code would be applicable to the lands sold.

In December 1941 the Good Pine Oil Company was dissolved . . . . [and] Nebo Oil Company, was organized and by mesne conveyances acquired all of the mineral rights formerly held by Good Pine Oil.

It was stipulated by and between the parties that no drilling operations have been conducted on the 800 acres of land involved or on lands contiguous thereto. However, it appears that the mineral rights acquired by Good Pine Oil by virtue of the 1932 deed from Bodcaw were exercised by the drilling of five separate wells between October

> 1941 and October 1948, three of which were located on lands conveyed to the United States under the 1936 deed from Bodcaw. . . .
>
> The gravamen of the complaint is that no drilling operations were conducted on the lands in suit during the ten years period beginning November 12, 1932; and that consequently any mineral rights owned by Good Pine Oil or its successor, Nebo Oil, had prescribed by ten years of nonuser [sic] of the servitude. For answer, Nebo Oil denied that the mineral rights had prescribed and set up the defenses, among others, that there had been an interruption of the ten year prescriptive period for the reason that the minerals underlying the 800 acre tract were pooled with other minerals which had been developed, and exercise of the servitude on any part of the pooled acreage interrupted prescription with respect to all of the minerals included in the pool; and that the mineral rights were imprescriptible by virtue of Act 315 of the Louisiana Legislature of 1940.[4]

The Court first rejected Nebo Oil's defense that the pooling of the lands interrupted prescription, finding that the pooling agreement was never recorded and thus could not affect third parties.[5]

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4. *Id.* at 1005-06.

5. *Id.*, at 1007. The Court likely addressed this issue first and directly because of basic abstention doctrine concerns. If the Court

(Cont'd)

Appendix D

Next, the Court addressed the Constitutionality of Act No. 315 of 1940, which derogated from the default rules applicable to the extinguishment of mineral servitudes and established a rule of imprescriptability for those servitudes burdening lands purchased or expropriated by the United States.[6] The Court found that Act 315 was retroactively applicable, "because of the general rule of law established by the jurisprudence of this State that laws of prescription and those limiting the time within which actions may be

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(Cont'd)
had found interruption of prescription by pooling it could have avoided the constitutional questions presented. Otherwise, one could view the interruption of prescription by pooling as a moot issue in light of the Court's application of Act 315 to the servitude at issue. Approaching this from a *res judicata* perspective, as opposed to a Constitutional mindset, such an issue or other issues relating to prescription need not be addressed first and may be properly viewed as moot in the event *res judicata* is held to bar such a claim. Therefore, this Court need not entertain plaintiff's motion for summary judgment on alternative grounds of interruption of prescription [Doc. 88] nor defendant's contentions in such regards.

6. Act 315 of 1940 reads in pertinent part, to wit: "Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible."

brought are retrospective in their operation."[7] The Court further found that the scheme of acquisitive prescription cannot give rise to a vested right and is "nothing more than a mere expectation, or hope, based upon an anticipated continuance of the applicable general laws."[8] The court concluded "that this so-called 'reversionary interest' is nothing more than a mere expectancy, or hope, based upon an anticipated continuance without change of the applicable laws of prescription and cannot be regarded as a vested right protected by the Constitution."[9]

The *Nebo* Court concluded with the following broad statement:

> Act 315 of 1940 provides that when lands are conveyed to the United States subject to a prior

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7. *Id.* at 1008 (*citations omitted*). Stating that the statute was retroactively applied is a bit of a misnomer. Act 315 of 1940 was merely applied from the moment of its legislative birth, with the result that application in 1940 may have had retroactive effect upon previously contemplated contractual or legislatively authorized expectations. Put squarely, those outstanding mineral servitudes which had not prescribed at the time Act 315 of 1940 was enacted would never prescribe and the hopes of the surface owner would have been defeated. All the outstanding, yet unprescribed, mineral interests were now made imprescriptable. True retroactive application would have meant that prior mineral rights which had prescribed to the governmental landowner would have been undone. This is not what happened, as such rights would have been "vested."

8. *Id.*

9. *Id.* at 1009. The Court also found that Act 315 of 1940 did not run afoul of the Contract Clause of the U.S. Constitution. *Id.*

sale or reservation oil, gas, or other minerals still in force and effect, the rights so reserved or previously sold shall be imprescriptible. It does not state or imply that the reserved rights shall be increased or varied but only that they shall not be lost by prescription. The consideration of $1.75 per acre paid by the United States did not cover the value of any mineral rights. Indeed, since the mineral underlying the lands had previously been sold to Good Pine Oil without limit for time of their enjoyment, Bodcaw did not own any minerals which it could sell to the United States. Neither could it reserve nor sell the expectation of a servitude lapsed for nonuser [sic]. . . . All that Bodcaw had which it could sell to the United States was the timber land itself. That was the obligation of the contract and it remains unimpaired. By virtue of its ownership of the land appellant could merely hope that the outstanding mineral servitude might lapse but this hope or expectancy was born or a statute of prescription based on the then existing public policy of the State as declared by its legislature. It was not a part of the obligation of the contract. It was wholly given by law and the power that gave it could increase, diminish, or otherwise alter, or wholly take it away without violating the Federal Constitution.

Judgment affirmed.[10]

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10. *Id.* at 1010.

Appendix D

From November 1934, through January 1937, the United States acquired, pursuant to the Weeks Act,[11] approximately 180,000 acres of land located in Grant, Winn and Natchitoches Parishes from Bodcaw Lumber Company and Grant Timber & Manufacturing Company. This was accomplished through eleven different conveyances—nine deeds and two expropriation judgments (Def.'s Opp.Mot.Summ.J. ¶ B, Ex's. 1-11 [Doc. 133]). Prior to that, from November 1932, through May 1934, Good Pine Oil Company acquired the mineral rights to the 180,000 acres described above, pursuant to six mineral conveyances (*Id.,* Ex's. 12-17). At the time of the acquisitions, all of the lands acquired by the United States were clearly burdened by the six mineral servitudes running in favor of Good Pine Oil Company (*Id.,* ¶ B and Def.'s Resp.Pl.'s Stat. Uncontested Fact ¶ 5 [Doc. 134]). In 1948, when the United States filed suit for declaratory judgment, Nebo Oil Company was the successor in interest to all of the Good Pine Oil Company's then outstanding mineral rights. The United States does not dispute that the current plaintiffs, via various conveyances, are successors in interest to the mineral servitudes that had been previously owned by Good Pine Oil and later Nebo Oil Company (Def.'s Opp.Mot.Summ.J. ¶ B and Def.'s Resp.Pl.'s Stat. Uncontested Fact ¶ 3).

Based on the *Nebo Oil* Fifth Circuit opinion and the stipulated facts, there can be no real dispute that: (i) At the time Act 315 of 1940 was enacted the United States owned the surface of the 180,000 acres at issue, which were burdened

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11. 1911, 36 Stat. 961 (codified in various sections of Title 16 U.S.C.). This is the enabling legislation for the National Forest System.

by mineral servitudes running in favor of Good Pine Oil Co.; (ii) In 1948, the United States sought a declaratory judgment against Nebo Oil Co. on 800 acres; (iii) The Fifth Circuit found that Act 315 of 1940 was applicable to the minerals underlying the 24,943.93 acre tract of land sold to the United States, of which the 800 acres was a part, and that those minerals were imprescriptible;[12] and (iv) plaintiffs are the current successors in interest to whatever outstanding mineral rights Good Pine Oil Co. originally acquired.

In 1972, the Supreme Court decided *Little Lake Misere.*[13] *Little Lake* established that Act 315 of 1940 did not apply to mineral servitudes burdening lands acquired by the United States pursuant to the Federal Migratory Game Bird Act. The Court used federal choice of law principles (particularly the *Clearfield Trust*[14] Doctrine) in refusing to apply Act 315 of 1940.[15] Instead, the Court applied the residual prescription rule of ten years non-use.[16]

In 1991, forty years after *Nebo Oil,* and almost twenty years after *Little Lake,* the United States Bureau of Land Management apparently took notice of the *Little Lake* opinion and began leasing and/or attempting to lease portions of the

12. *See* discussion and quotation of *Nebo Oil supra.*

13. 412 U.S. 580, 93 S.Ct. 2389 (1973).

14. 318 U.S. 363, 63 S.Ct. 573 (1943).

15. 412 U.S. at 591-94.

16. 412 U.S. at 604.

180,000 acres at issue, as to which plaintiff's claim ownership in perpetuity (Pl.'s Compl. ¶ 14, Ex. E [Doc. 1] and Def.'s Answer ¶ 14 [Doc. 17]). In February 2000, after many letters of protest and exchanges with the United States (Pl.'s Compl. ¶ 15 and Def.'s Answer ¶ 14), Petro-Hunt filed this Quiet Title action pursuant to 28 U.S.C. §§ 2201 and 2409, seeking to be declared the owners of the mineral servitudes in perpetuity and declaring the leases granted by the United States a nullity (Pl.'s Compl. ¶ 18).

SUMMARY JUDGMENT STANDARD

Under Fed.R.Civ.P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A fact is "material" if it may affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). An issue is "genuine" if there is sufficient evidence so that a reasonable jury could return a verdict for either party. *Id.*

The moving party bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions, and/or affidavits which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548 (1986); *Lawrence v. Univ. of Tex. Med. Branch at Galveston,* 163 F.3d 309 (5th Cir.1999). The moving party is not required to negate the elements of the non-moving

party's case. *Lawrence,* 163 F.3d at 311. However, where the moving party bears the burden of proof on an issue, it must produce evidence that would, if uncontroverted at trial, warrant a judgment as a matter of law. *Int'l Shortstop, Inc. v. Rally's, Inc.,* 939 F.2d 1257, 1264-65 (5th Cir.1991).

Once the moving party carries its initial burden, the burden then falls upon the non-moving party to demonstrate the existence of a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 584-88, 106 S.Ct. 1348, 1355-56 (1986). The non-moving party "must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." *Wallace v. Texas Tech. Univ.,* 80 F.3d 1042, 1047 (5th Cir.1996) (citations omitted). This burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory or unsubstantiated allegations, or by a mere scintilla of evidence. *Little v. Liquid Air. Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (citations omitted). In the absence of any proof, the court will not assume the non-moving party could or would prove the necessary facts. *Id.*

Pursuant to Local Rule 56.1, the moving party shall file a Statement of Uncontested Facts as to which it contends there is no genuine issue to be tried. Local Rule 56.2W requires that a party opposing the motion for summary judgment set forth a "short and concise statement of the material facts as to which there exists a genuine issue to be tried." All material facts set forth in the statement required to be served by the moving party "will be deemed admitted, for the purposes of the motion, unless specifically denied." Local Rule 56.2W.

Appendix D

LAW AND ANALYSIS

A. Framing this case properly for purposes of *res judicata* analysis.

1. Numerosity of servitudes addressed.

The United States suggests that the 800 acre servitude involved in Nebo Oil is "one of 96 servitudes that, at one time, burdened the approximately 180,000 acres at issue in this case . . . . [and that] [e]ach mineral servitude involves a separate nucleus of operative fact." They further state that the "96 servitudes have different drilling and production histories." (Def.'s Opp.Mot.Sum.J. pp. 15-16 [Doc. 133]).[17] This Court does not believe that 96 separate or mini-trials are necessary for the resolution of the issue of *res judicata.* None of the servitudes had been outstanding for longer than 8 years upon the enactment of Act 315 of 1940. Therefore, this Court could not address prescription issues if *Nebo Oil,* and more specifically Act 315 of 1940, were to have preclusive effect between these parties, as none of the mineral servitudes would have ever prescribed.

2. Ripeness addressed.

The United States also raises the issue of ripeness. In the end, like prescription, it is of no import if *res judicata* is to apply. There was no reason for the United States to wait

17. The United States apparently arrived at this figure by looking at the number of mineral conveyances, number of acquisition deeds, contiguous acreage estimations and various drilling and production data.

ten years to litigate title to property whose owners claimed it would never prescribe. The issue of the application of Act 315 of 1940 was actually litigated to a conclusion. Hypothetically, if Act 315 of 1940 had been held inapplicable or unconstitutional in *Nebo Oil,* it is extraordinary to imagine that either party would have thereafter though that Act 315 of 1940 applied to any of the other factually similarly mineral servitudes. In such an event, Nebo Oil Co. would have understood that its other outstanding mineral servitudes were subject to the default rule of ten year prescription of non-use. The converse is also true and the actions of the parties for forty years after the *Nebo Oil* opinion demonstrate such.

3. Contractual language—the conveyances giving rise to the mineral servitudes and mineral reservations are similar and not subject to varying interpretation.

The operative language in all six mineral servitudes is virtually identical and all six would have been consistently interpreted under the pre- Mineral Code law—as giving rise to an ordinary mineral servitude, which was subject to prescription for ten years non-use.[18] There is nothing remarkable about the language creating these particular mineral servitudes. In regards to prescription, one of the only

18. *See* the oft-cited case *Frost-Johnson Lumber Co. v. Salling's Heirs,* 150 La. 756, 91 So. 207 (1920) and its progeny, for the creation and recognition of the mineral servitude. Under clear jurisprudence at the time, the mineral servitude was (and still is) a fixed beacon, unique to Louisiana law. Persons have in vain attempted to circumvent and impose permanent dismemberments of title (which is allowed in Texas and many other states), but this is only achievable in Louisiana by legislative fiat, such as in Act 315 of 1940.

meaningful things the parties could have done (if not also surface owners), would have been to stipulate a shorter prescriptive period than the applicable ten years. This, nor anything apart from the default rules was intended.

Turning to the mineral reservations in the conveyances to the United States (not the mineral servitudes discussed above), the government attempts to create a title quandry—"four of the deeds and one judgment, including the February 11, 1936 deed involved in Nebo Oil, created reversionary interests in the vendor if the servitudes held by Good Pine Oil prescribed, while the remaining conveyances contained no such provision." (Def.Opp.Mot.Summ.J. pg. 13 [Doc. 133]). This factual segue by the government is misleading. The attorneys who drafted such mineral reservations undoubtedly understood that Louisiana mineral law does not support reversionary interests and were also undoubtedly attempting, as with any zealous advocate, to reserve their rights to the full extent of the law.[19] This Court

19. As found by the Court of Appeals in *Nebo Oil,* "Prior to the year 1936 the United States was interested in purchasing lands in Louisiana for national forest purposes and had found that owners of large tracts of land were unwilling to sell their lands because of court decisions holding that the sale or reservation of mineral rights in Louisiana created only a right in the nature of a servitude which was subject to prescription by ten years nonuser [sic]. However, the United States Department of Agriculture, Forest Service, was not in accord with this view and on May 29, 1935, submitted to Bodcaw Lumber Company an opinion of the Assistant Solicitor of the Department of Agriculture to the effect that the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for national forest purposes." What would have created factual

(Cont'd)

examined the language referenced by the United States and finds nothing remarkable. The different clauses simply represent an elaboration of basic principles of mineral law, *e.g.*, what it takes to interrupt prescription. In other words, these were just two different versions of "plain-vanilla," boilerplate, mineral reservation language.

This Court finds that all of the mineral servitudes and reservations would be given the same effect under Louisiana law. None of the clauses utilized are so substantially different that they would give rise to some interpretation and application inconsistent with the default rules for mineral servitudes or with the mineral servitude and reservation at issue in *Nebo Oil.*

4. *The issue of the applicability of Act 315 of 1940 has been litigated.*

Through its actions, the United States has demonstrated that it no longer feels that the *Nebo Oil* judgment holds sway, even between parties in privity. This Court is addressing *res judicata.* Had the United States sought to litigate other mineral servitudes, underlying other parcels of land not related to the *Nebo Oil* litigation, the mineral servitude

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(Cont'd)

dissimilarities in these mineral reservations is if the drafters of these documents had included language about the aforementioned opinion of the Department of Agriculture. Including such language under the impression, albeit now a mistaken one, that the United States government was guaranteeing permanent severability of the minerals, would have lent itself to further examination and would have warranted the United States' invocation of alleged factual differences.

owners would not have cried preclusion or *res judicata,* they would have merely pointed to the fact that the case law was in their favor. In fact, this did occur in Cameron Parish in 1972 on lands acquired under the Federal Migratory Game Bird Act. Unsurprisingly, defendants in that litigation pointed to *Nebo Oil,* but this time the Court found Act 315 of 1940 was not applicable to then outstanding mineral interests and held that the default rule of prescription by ten years non-use applied.[20]

New decisional law was made, and now, some forty years later, the United States is using the *Little Lake Misere* case as a buffer for what it undoubtedly could not have done prior to *Little Lake Misere.* This two step approach does not short circuit the application of *res judicata,* especially in the realm of real property. The United States is relying on a change of law to undo a prior case—not merely attack the holding or decline to follow it in future litigation, but actually attempting to undo its effects, as between the parties. That is not to say that the United States has to continue to apply the holding of *Nebo Oil* in current mineral servitude disputes, merely that it cannot undo the effects of that judgment between it and the privies of Nebo Oil Co.

5. *This judgment specifically addresses res judicata/ claim preclusion—all other arguments/contentions are moot.*

This Court restates that it does not need to delve into such matters as what constitutes continguous tracts, the

20. *See* discussion of *Little Lake Misere* on pg. 675, *supra.*

number of servitudes, and whether prescription of nonuse was interrupted by good faith operations for the discovery and production of minerals. All such considerations are rendered moot by the Court's finding that *res judicata* is applicable to the entirety of this case.[21]

Unlike an analysis of prescription, contiguous acreage, or good faith drilling operations, this Court is faced with what may be viewed as a primarily legal question. The basic facts as to the location of the property in dispute and who are the ancestors in title to Nebo Oil Co. are not in dispute. What is in dispute is the preclusive effect of the *Nebo Oil* decision. Therefore, this issue is particularly ripe for disposition by summary judgment.

B. *Res Judicata* takes on increased importance in the realm of real property.

The doctrine of claim preclusion embodies a "fundamental precept of common-law adjudication," which holds that a claim or issue which parties had a full and fair opportunity to litigate should, after judgment, forever be put to rest as between those parties.[22] Likewise, the public's

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21. *See supra* note 5.

22. *Montana v. United States,* 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979). A non-exclusive list of policies supporting claim preclusion are (i) to promote fairness; (ii) to prevent inconsistent judgments and to achieve uniformity and certainty; (iii) to finalize disputes among the parties; and (iv) to conserve judicial resources. Jay Carlisle, "Second Circuit 1999-2000 Res Judicata Developments," 20 BLR 75, 77 (Summer 2000).

interest in the reliability and certainty of titles to real property is substantial and requires efficient and decisive resolution. Therefore, in matters pertaining to real property, these two interests combine to encourage strict application of the claim preclusion doctrine. This Court could not have improved on the words of the Supreme Court in *Minnesota Mining Co. v. National Co.*:[23]

> Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of states affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.[24]

Nevada v. United States[25] is a roughly similar case to the one at bar. In *Nevada,* the Court found that *res judicata*

23. 70 U.S. 332, 334, 18 L.Ed. 42 (1865).

24. *Id.*, (*quoted* in *Nevada v. United States,* 463 U.S. 110, 129, n. 10, 103 S.Ct. 2906, 2918, n. 10 (1983)).

25. 463 U.S. 110, 103 S.Ct. 2906 (1983).

applied, thereby preventing the United States from re-litigating issues resolved in a court approved settlement agreement involving rights to water from the Truckee River. In *Nevada,* the original settlement judgment was entered in 1944, and 29 years later the government instituted another challenge seeking additional water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation. The Court found that all water rights from the Truckee River had been previously and conclusively decided. The Court noted that the "policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water. . . ."[26]

C. Legal standard applicable to *res judicata* or claim preclusion.

This Court is presented with the issue of the preclusive effect of the *Nebo Oil* case on the current litigation. The classic formulation of the claim preclusion doctrine was set forth in *Cromwell v. County of Sac*:[27]

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other

26. *Id.*, 463 U.S. at 129, n. 10, 103 S.Ct. at 2918, n. 10.

27. 94 U.S. 351, 352, 24 L.Ed. 195 (1876).

admissible matter which might have been offered for that purpose.

The Cromwell test has been little altered. The Fifth Circuit has applied a four-part test for determining when a claim will be barred as a result of a judgment in a prior action: (i) there must be a final judgment on the merits; (ii) the prior action must have involved the same parties or their privies; (iii) the prior action must have involved the same claim; (iv) the judgment in the prior action must have been rendered by a court of competent jurisdiction.[28] This court finds that all four elements are met. Elements (i), (ii) and (iv) are not major points of contention in this litigation, although privity is briefly addressed in Part -D below. Element (iv) is where the greatest dispute lies and is addressed in Part - E below.

D. Plaintiff's share privity with Nebo Oil Co. for purposes of *res judicata.*

Privity, as one of the necessary elements for application of *res judicata,* is a rather amorphous, factual determination. Often it is utilized in a conclusory fashion—privity "is not a requirement we can satisfy through inquiry; rather the existence of 'privity' is the inquiry satisfied."[29] It has also

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28. *See Rivet v. Regions Bank of Louisiana, F.S.B.,* 108 F.3d 576, 586, *cert. granted* 118 S.Ct. 31, 521 U.S. 1152, *reversed* 118 S.Ct. 921, 522 U.S. 470, *on remand* 139 F.3d 512 (5th Cir.1997); *Travelers Ins. Co. v. St. Jude Hosp. of Kenner,* 37 F.3d 193, 195 (5th Cir.1994); and *Corporate Health Ins., Inc. v. Texas Dept. of Ins.,* 12 F.Supp.2d 597 (S.D.Tex.1998).

29. *Russell v. SunAmerica Sec., Inc.,* 962 F.2d 1169, 1174 (5th Cir.1992).

been described rather cryptically as a "close enough relationship."[30] A relevant cite is found in *Latham v. Wells Fargo Bank, N.A.*:[31]

> '[P]arties' for the purposes of res judicata does not mean formal, paper parties only, but also includes 'parties in interest, that is, those persons *whose interests are properly placed before the court* by someone with standing to represent them are bound by matters determined in the proceeding.' . . . A non-party is in privity with a party for res judicata purposes . . . if he has succeeded to the party's interest in property. . . .[32]

The concept of privity is not disputed or really addressed by the United States. The government admits that plaintiffs in this case are ancestors in title to Nebo Oil's mineral rights. Therefore, for purposes of *res judicata,* this Court finds that plaintiff's "succeeded" to Nebo Oil Co.'s "interest in the property" and that there is privity between plaintiffs and Nebo Oil Co.

E. Scope of the claim preclusion doctrine—application to this case.

The most contentious aspect of this *res judicata* inquiry is determining the scope of the claim preclusion doctrine.

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30. *Bruszewski v. United States,* 181 F.2d 419, 423 (3rd Cir.1950).

31. 896 F.2d 979 (5th Cir.1990).

32. *Id.* at 983.

In this case, that determination is whether the claim to the 180,000 acres is, for purposes of *res judicata,* the same claim which was or could have been asserted in the *Nebo Oil* litigation. The scope of *res judicata* preclusion has been enunciated in a variety of ways, *e.g.,* that it addresses all relevant issues,[33] or all claims that could have been advanced,[34] or as a corollary to the affirmative pleading rules for compulsory counterclaims and affirmative defenses.[35] The basic idea is that, "Claim preclusion or *res judicata,* bars the litigation of claims that either have been litigated or should have been raised in an earlier suit."[36]

It does not matter that the law applicable to Nebo Oil may have changed pursuant to the *Little Lake Misere*[37]

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33. *Richards v. Jefferson County, Ala.,* 517 U.S. 793, 798, 116 S.Ct. 1761, 1765 (1996) ("[A] prior judgment is generally 'res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit.'" (*citation omitted*)).

34. *Goldberg v. R.J. Longo Constr. Co. Inc.,* 54 F.3d 243, 246 (5th Cir.1995) (Res judicata bars "all claims that were or *could have been* advanced in support of the cause of action on the occasion of its former adjudication . . . not merely those that were adjudicated." (*citations omitted*)).

35. *Brown v. Felsen,* 442 U.S. 127, 131, 99 S.Ct. 2205, 2209 (1979) ("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." (*citations omitted*)).

36. *In re Southmark Corp.,* 163 F.3d 925, 934 (5th Cir.1999).

37. 412 U.S. 580, 93 S.Ct. 2389 (1973).

opinion. It also does not matter whether the application of claim preclusion to a particular case will result in an unfair or harsh outcome.[38] As a general rule, a change in the statutory or case law will not alter the claim preclusion effect of a prior judgment—"the res judicata consequences of a final, unappealed judgment on the merits [is not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."[39]

In regards to what constitutes a claim, the Fifth Circuit accepts or at least endorses the "Same Transaction Test," found in § 24 of the Restatement (Second) of Judgments, which reads as follows:[40]

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of

38. *In re Teal,* 16 F.3d 619, 622 n. 6 (5th Cir.1994) (conclusion reached by court "comports with the well-known rule that a federal court may not abrogate principles or res judicata out of equitable concerns. . . . Indeed, it must give res judicata effect to a prior judgment even if it would be voidable on appeal because of legal error" (*citations omitted*)).

39. *Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394, 398, 101 S.Ct. 2424, 2428 (1981) (*citations omitted*).

40. *In re Southmark Corp.,* 163 F.3d 925, 934 (5th Cir.1999); *Goldberg v. R.J. Longo Constr. Co.,* 54 F.3d 243, 246 (5th Cir.1995).

> connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a 'transaction,' and what groupings constitute a 'series' are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

The government is not free to select a particular 800 acres, litigate over that, lose, and then re-litigate other parcels of land which are similarly situated. This practice runs afoul of the prudent observation in *United States v. Stauffer Chemical Co.,* that a party may not "litigate twice with the same party an issue arising in both cases from virtually identical facts."[41] At the time *Nebo Oil* was brought (1948), the United States was well aware of the marked shift in federal civil procedure which was ushered in with the Federal Rules of Civil Procedure in 1938. With the elimination of the distinction between law and equity, the advent of notice pleading, liberal joinder and amendment, and broad discovery rights, parties had ample opportunity to present all of their related claims and defenses in the same action.

"The United States concedes that the ownership of the mineral rights underlying the 800 acres involved in

41. 464 U.S. 165, 172, 104 S.Ct. 575, 579 (1984).

Nebo Oil was decided and cannot be revisited here." (Def.'s Opp. Mot. Summ. J., pg. 11 [Doc. 133]). This Court also finds that the Fifth Circuit applied Act 315 of 1940 to the mineral reservation and sale of the 24,943.93 acre tract to the United States, of which the 800 acres was a part. Accordingly, those minerals underlying the 24,943.93 acre tract were previously held imprescriptible and *res judicata* clearly applies.

As previously discussed, this Court finds that the five other servitudes and the later mineral reservations burdening the 180,000 acres are virtually identical to the servitude and reservation at issue in *Nebo Oil.*[42] None of the servitudes had been outstanding for longer than eight (8) years upon the enactment of Act 315 of 1940. Therefore, all of the servitudes were equally situated and susceptible to the application of Act 315. In addition, all of the surface of the disputed acreage was acquired by the United States pursuant to the Weeks Act and none of the language in such deeds or mineral reservations would have warranted a different legal conclusion at the time of *Nebo Oil.* Accordingly, this Court finds that the entire 180,000 acres was similarly situated to the 800 acres at issue in *Nebo Oil.*

From an examination of *Nebo Oil,* it is obvious that had the government elected, as plaintiff in *Nebo Oil,* to include all similarly situated acreage in that suit, it would not have

42. *See* analysis in Part A-3, *supra,* for the proposition that none of the clauses utilized are so substantially different that they would give rise to some interpretation and application inconsistent with the default rules for mineral servitudes or with the servitude at issue in *Nebo Oil.*

changed the decision of that Court. The government has had a "full and fair opportunity" to litigate the application and constitutionality of Louisiana Act 315 of 1940 to this mineral property. The government should not be allowed to litigate now that which it could have litigated 50 years ago. *Res judicata* now bars the United States from re-litigating these issues.

CONCLUSION

For the foregoing reasons, this Court finds that Plaintiff's Motion for Summary Judgement [Doc. 85] must be granted. A formal judgment, prepared by plaintiffs and approved as to form by the United States, will be signed upon presentation.

THUS DONE AND SIGNED, in Shreveport, Louisiana, on this 17 day of December, 2001.

s/ Donald E. Walter
Donald E. Walter
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED JUNE 1, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-30760

PETRO-HUNT LLC; HUNT PETROLEUM CORP; KINGFISHER RESOURCES INC

Plaintiffs - Appellees

v.

UNITED STATES OF AMERICA; ET AL

Defendants

UNITED STATES OF AMERICA

Defendant - Appellant

Consolidated With 02-30786

PETRO-HUNT LLC; HUNT PETROLEUM CORP; KINGFISHER RESOURCES INC

Plaintiffs - Appellants

v.

Appendix E

UNITED STATES OF AMERICA; ASPECT RESOURCES LLC; BAYOU PETROLEUM CO; FIRST TEXAS HYDROCARBONS, INC; OSCAR C FORLAND; GULF COAST OIL & GAS CO; JUSTISS OIL COMPANY INC; MB EXPLORATION, LLC; NORTHSTAR ENERGY LLC; PALMER PETROLEUM INC; HOWELL R SPEAR; JOHN P STRANG; WHELESS TDL EXPLORATION COMPANY, LLC; OCEAN ENERGY RESOURCES INC, formerly known as UMC Petroleum Corp; DEVON SFS OPERATING INC, formerly known as Santa Fe Snyder Corp; J BRADLEY JEFFREYS; ENERGY ARROW EXPLORAION LLC; CARUTHERS PRODUCING COMPANY INC

Defendants - Appellees

Appeals from the United States District Court for the Western District of Louisiana, Shreveport

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 3/31/04, 5 Cir., _____, _____ F.3d _____)

Before Judges EMILIO M. GARZA, and DENNIS, Circuit Judges, and VANCE*, District Judge.

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* District Judge of the Eastern District of Louisiana, sitting by designation.

Judges Higginbotham, Wiener, and Clement did not participate in the consideration of the rehearing en banc.

Appendix E

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge

APPENDIX F — WEEKS ACT, CH. 186, 36 STAT. 961 (1911)

SIXTY-FIRST CONGRESS. SESS. III, CH. 186. 1911.

CHAP. 186.—An Act To enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to each of the several States of the Union to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of conserving the forests and the water supply of the States entering into such agreement or compact.

SEC. 2. That the sum of two hundred thousand dollars is hereby appropriated and made available until expended, out of any moneys in the National Treasury not otherwise appropriated, to enable the Secretary of Agriculture to cooperate with any State or group of States, when requested to do so, in the protection from fire of the forested watersheds of navigable streams; and the Secretary of Agriculture is hereby authorized, and on such conditions as he deems wise, to stipulate and agree with any State or group of States to cooperate in the organization and maintenance of a system of fire protection on any private or state forest lands within such State or States and situated upon the watershed of a navigable river: *Provided*. That no such stipulation or agreement shall be made with any State which has not

provided by law for a system of forest-fire protection: *Provided further*, That in no case shall the amount expended in any State exceed in any fiscal year the amount appropriated by that State for the same purpose during the same fiscal year.

SEC. 3. That there is hereby appropriated, for the fiscal year ending June thirtieth, nineteen hundred and ten, the sum of one million dollars, and for each fiscal year thereafter a sum not to exceed two million dollars for use in the examination, survey, and acquirement of lands located on the headwaters of navigable streams or those which are being or which may be developed for navigable purposes: *Provided*, That the provisions of this section shall expire by limitation on the thirtieth day of June, nineteen hundred and fifteen.

SEC. 4. That a commission, to be known as the National Forest Reservation Commission, consisting of the Secretary of War, the Secretary of the Interior, the Secretary of Agriculture, and two members of the Senate, to be selected by the resident of the Senate and two members of the House of Representatives, to be selected by the Speaker, is hereby created and authorized to consider and pass upon such lands as may be recommended for purchase as provided in section six of this Act, and to fix the price or prices at which such lands may be purchased, and no purchases shall be made of any lands until such lands have been duly approved for purchase by said commission: *Provided*, That the members of the commission herein created shall serve as such only during their incumbency in their respective official positions, and any vacancy on the commission shall be filled in the manner as the original appointment.

Appendix F

SEC. 5. That the commission hereby appointed shall, through its president, annually report to Congress, not later than the first Monday in December, the operations and expenditures of the commission, in detail, during the preceding fiscal year.

SEC. 6. That the Secretary of Agriculture is hereby authorized and directed to examine, locate, and recommend for purchase such lands as in his judgment may be necessary to the ration of the flow of navigable streams, and to report to the National Forest Reservation Commission the results of such examinations: *Provided*, That before any lands are purchased by the National Forest Reservation Commission said lands shall be examined by the Geological Survey and a report made to the Secretary of Agriculture, showing that the control of such lands will promote or protect the navigation of streams on whose watersheds they lie.

SEC. 7. That the Secretary of Agriculture is hereby authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission: *Provided,* That no deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this Act until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of reserving the navigability of navigable streams.

SEC. 8. That the Secretary of Agriculture may do all things necessary to secure the safe title in the United States

to the lands to be acquired under this Act, but no payment shall be made for any such lands until the title shall be satisfactory to the Attorney General and shall be vested in the United States.

SEC. 9. That such acquisition may in any case be conditioned upon the exception and reservation to the owner from whom title passes to the United States of the minerals and of the merchantable timber, or either or any part of them, within or upon such lands at the date of the conveyance, but in every case such exception and reservation and the time within which such timber shall be removed and the rules and regulations under which the cutting and removal of such timber and the mining and removal of such minerals shall be done shall be expressed in the written instrument of conveyance, and thereafter the mining, cutting, and removal of the minerals and timber so excepted and reserved shall be done only under and in obedience to the rules and regulations so expressed.

SEC. 10. That inasmuch as small areas of land chiefly valuable for agriculture may of necessity or by inadvertence be included in tracts acquired under this Act, the Secretary of Agriculture may, in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain the location and extent of such areas as in his opinion may be occupied for agricultural purposes without injury to the forests or to stream flow and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and offer them for sale as homesteads at their true value, to be fixed by him, to actual settlers, in tracts not exceeding eighty acres in area,

under such joint rules and regulations as the Secretary of Agriculture and the Secretary of the Interior may prescribe; and in case of such sale the jurisdiction over the lands sold shall, ipso facto, revert to the State in which the lands sold lie. And no right, title, interest, or claim in or to any lands acquired under this Act, or the waters thereon, or the products, resources, or use thereof after such lands shall have been so acquired, shall be initiated or perfected, except as in this section provided.

SEC. 11. That, subject to the provisions of the last preceding section, the lands acquired under this Act shall be permanently reserved, held, and administered as national forest lands under the provisions of section twenty-four of the Act approved March third, eighteen hundred and ninety-one (volume twenty-six, Statutes at Large, page eleven hundred and three), and Acts supplemental to and amendatory thereof. And the Secretary of Agriculture may from time to time divide the lands acquired under this Act into such specific national forests and so designate the same as he may deem best for administrative purposes.

SEC. 12. That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation and administration as national forest lands, except so far as the punishment of offenses against the United States is concerned, the intent and meaning of this section being that the State wherein such land is situated shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State.

Appendix F

SEC. 13. That five per centum of all moneys received during any fiscal year from each national forest into which the lands acquired under this Act may from time to time be divided shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated; to be expended as the state legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: *Provided*, That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein: *Provided further*, That there shall not be paid to any State for any county an amount equal to more than forty per centum of the total income of such county from all other sources.

SEC. 14. That a sum sufficient to pay the necessary expenses of the commission and its members, not to exceed an annual expenditure of twenty-five thousand dollars, is hereby appropriated out of any money in the Treasury not otherwise appropriated. Said appropriation shall be immediately available, and shall be paid out on the audit and order of the president of the said commission, which audit and order shall be conclusive and binding upon all departments as to the correctness of the accounts of said commission.

Approved, March 1, 1911.

APPENDIX G — LOUISIANA ACT 315 OF 1940

ACT No. 315

House Bill No. 255. By Mr. Jack.

AN ACT

Providing that when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and the act of acquisition, verdict or judgment contains a reservation of oil, gas and/or other minerals or royalties, or provides that said land passes subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still extant, said rights so reserved or previously sold shall be imprescriptible; and repealing Acts 68 and 151 of 1938 and other laws, general or special, inconsistent herewith.

Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible.

Appendix G

Section 2. That Act 68 and Act 151 of 1938 and all other laws or parts of laws, general or special, in conflict herewith are hereby repealed.

Approved by the Governor: July 20, 1940.

A true copy:

JAS A. GREMILLION,
Secretary of State.

APPENDIX H — COMPLAINT IN *UNITED STATES v. NEBO OIL* FILED APRIL 30, 1948

TRANSCRIPT OF APPEAL

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF LOUISIANA,
SHREVEPORT DIVISION.

No. 2379 Civil

UNITED STATES OF AMERICA,

Versus

NEBO OIL COMPANY, INCORPORATED.

Taken By Plaintiff, To The United States Court Of Appeals, Fifth Circuit, New Orleans, Louisiana.

In the District Court of the United States for the Western District of Louisiana,
Shreveport Division.

No. 2379

United States of America, Petitioner,

vs.

Nebo Oil Company, Inc., Defendant.

Appendix H

To The Honorable Judges Of Said Court:

The petition of the United States of America, a sovereign, appearing herein through Malcolm E. LaFargue, United States Attorney, and William J. Fleniken, Assistant United States Attorney, and Sol B. Pressburg, Special Attorney, United States Department of Justice, under instructions of the Attorney General of the United States of America, and respectfully represents that:

I.

This is a civil action arising under the Constitution and the laws of the United States, particularly Sec. 274(d) of the Judicial Code of the United States, commonly known as the statute authorizing declaratory judgments and the procedure therefor (being Act of March 3, 1911 as amended by Acts of June 14, 1934, and August 30, 1935; 28 USCA Sec. 400).

II.

That your petitioner is the owner in fee simple of the following described property, to wit:

Northeast Quarter (NE¼); Southeast Quarter of Southeast Quarter (SE¼SE¼); West Half of Southeast Quarter (W½SE¼); West Half of Southwest Quarter (W½SW¼); Southwest Quarter of Northwest Quarter (SW¼NW¼); East Half of West Half (E½W½); Sec. 19, T. 13 N., R. 6 W., La. M.; Southeast Quarter (SE¼); South Half of Northeast Quarter (S½NE¼); Sec 24, T. 13 N., R. 7 W., La. M.

located in the Parish of Natchitoches, State of Louisiana, acquired from the Bodcaw Lumber Company of Louisiana, Inc. by deed dated February 11, 1936 duly recorded in the conveyance records of Natchitoches Parish, Louisiana.

III.

That the Nebo Oil Company, Inc. is a corporation organized under the laws of the State of Delaware, domiciled in Wilmington, Delaware, doing business in the State of Louisiana, and they have designated Eugene Marshall and P. S. Gaharan, Jr., Jena, LaSalle Parish, Louisiana, as their agents for process.

IV.

That your petitioner further shows that at the time of the acquisition of the above described lands, they were subject to a servitude created by the prior sale on November 12, 1932, to the Good Pine Oil Company, Inc. of the oil, gas and sulphur rights thereto.

V.

That the Nebo Oil Company, Inc. claims such mineral rights as successor in title to the Good Pine Oil Company, Inc.

Appendix H

VI.

That no drilling operations were conducted on said lands during the ten year prescriptive period beginning November 12, 1932, the date Good Pine Oil Company, Inc. acquired same, and therefore any mineral rights as may have been owned by Good Pine Oil Company, Inc., or its successor, Nebo Oil Company, Inc., have prescribed under the laws of the State of Louisiana.

VII.

That the Nebo Oil Company, Inc. claims to be the owner of said mineral rights in and under the land hereinabove described and have advised your petitioner that they, or their lessee, will drill a well on said land, and further, have advised that any interference with their operation by the United States will be resisted.

VIII.

That your petitioner is entitled to a declaratory judgment resolving the question of the ownership of the minerals in and under the above described land.

IX.

That your petitioner further alleges that the Nebo Oil Company, Inc., and/or their lessees threaten to and will drill a well on the hereinabove described land and commit trespass thereon, causing your petitioner irreparable damage; that said injury cannot be adequately redressed by an action at law for

the reason that it will deprive your petitioner of its free use and ownership of said land, and your petitioner is entitled to a permanent injunction prohibiting and restraining the said Nebo Oil Company, Inc., its agents, employees, and all persons acting under, through or for said defendant, Nebo Oil Company, Inc., and/or its lessees from drilling or otherwise trespassing on the above described land.

Wherefore, premises considered petitioner prays that service and citation of this petition be made upon Nebo Oil Company, Inc. through its agents, Eugene Marshall and P. S. Gaharan, Jr., Jena, LaSalle Parish, Louisiana, and after all legal delays and due proceedings had, that a declaratory judgment be rendered in favor of plaintiff, United States of America, and against the said Nebo Oil Company, Inc. in the following respects, to wit:

(a) Decreeing that the United States of America is the owner in complete fee of the land described in the above and foregoing petition;

(b) Decreeing the ownership of the minerals, including oil, gas and sulphur, in and under the above described land, to be vested in the United States of America.

Petitioner further prays that the Nebo Oil Company, Inc. and its officers, agents, employees, lessees, assignees, and all persons acting or claiming to act on behalf of said Nebo Oil Company, Inc. and its successors and their officers, agents, employees, lessees and assignees, be perpetually enjoined and restrained from in any way drilling, leasing or trespassing on the said property of your petitioner.

Petitioner further prays that it recover the costs of this suit.

Petitioner further prays for all orders and decrees necessary and proper and for full and general relief.

(S.) MALCOLM E. LARFARGUE,
United States Attorney.
(S.) WM. J. FLENIKEN,
Assistant United States Attorney.
(S.) SOL PRESSBURG,
Special Attorney, Department of Justice.

Filed Apr. 30, 1938.

PHILIP H. MECOM,
Clerk U. S. Dist. Court, West. Dist. of La.

APPENDIX I — ANSWER AND COUNTERCLAIM IN *UNITED STATES v. NEBO OIL* FILED MAY 26, 1948

ANSWER AND COUNTERCLAIM

(Titles omitted.)

No. 2379.

Now comes Nebo Oil Company, Inc., the defendant in the above entitled and numbered cause, and answers the complaint herein as follows:

First Defense.

1. Defendant admits the allegations contained in paragraphs I, III, VII, and VIII of the petition.

2. Defendant admits that the United States of America acquired the property described in paragraph II of the petition from Bodcaw Lumber Company of Louisiana, Inc. by deed dated February 11, 1936, recorded in Book 173, Folio 400 of the Conveyance Records of Natchitoches Parish, Louisiana.

3. Defendant admits that by deed dated November 12, 1932, recorded in Book 168, Folio 419 of the Conveyance Records of Natchitoches Parish, Louisiana, Bodcaw Lumber Company of Louisiana, Inc. sold and conveyed to Good Pine Oil Company, Inc. in perpetuity all of the oil, gas and sulphur in, on and under all of the lands acquired by the United States of America under the deed dated February 11, 1936, including the oil, gas and sulphur under the lands described in paragraph

II of the petition, and that the conveyance to the United States was made subject to the prior sale of the oil, gas and sulphur to Good Pine Oil Company, Inc.

4. Defendant alleges that it now owns, as successor in title, all of the right, title and interest in and to the oil, gas and sulphur acquired by Good Pine Oil Company, Inc. by the deed dated November 12, 1932.

5. Defendant admits that no drilling operations have been conducted since November 12, 1932, on the property described in paragraph II of the petition or on any lands contiguous thereto under which the defendant owns the mineral rights.

6. Defendant admits that it or its lessees intend to drill and will drill a well on the property described in paragraph II of this complaint and have so advised the Secretary of the Interior.

7. Defendant denies each and every other allegation contained in the petition.

8. Defendant further alleges that the rights of defendant in and to the oil, gas and sulphur under the lands described in paragraph II of the petition are imprescriptible by virtue of Act 315 of the Louisiana Legislature of 1940 (Dart's Louisiana General Statutes, Section 7156.4) and that defendant now owns all of the oil, gas and sulphur in, on and under said lands.

Appendix I

Second Defense.

1. In November, 1932, Bodcaw Lumber Company of Louisiana, Inc., Grant Timber & Manufacturing Company of Louisiana, Inc., Good Pine Lumber Company of Louisiana, Inc., Tall Timber Lumber Company of Louisiana, Inc., and Trout Creek Lumber Company of Louisiana, Inc. pooled and integrated all of the oil, gas and sulphur in, on and under certain large tracts of land which they owned in north central Louisiana by conveying such minerals to Good Pine Oil Company Inc. In exchange for the minerals thus conveyed, the participating corporation received all of the stock of Good Pine Oil Company, Inc., each corporation receiving stock in proportion to the acreage which it contributed.

2. The oil, gas and sulphur in, on and under the lands described in paragraph II of the petition were included in the minerals contributed to the pool by Bodcaw Lumber Company of Louisiana, Inc.

3. Within ten years after the mineral rights were pooled oil and gas were discovered on the acreage contributed by Good Pine Lumber Company of Louisiana, Inc., Tall Timber Lumber Company of Louisiana, Inc. and Trout Creek Lumber Company of Louisiana, Inc. and oil and gas has been produced from such acreage in large quantities without interruption since the date of discovery. No production has been obtained from the minerals contributed by Grant Timber & Manufacturing Company of Louisiana, Inc. and production in small quantities only has been obtained from minerals contributed by Bodcaw Lumber Company of Louisiana, Inc.

4. The income derived from such production has been and is now being distributed to all of the participants in the pooling agreement, or their stockholders, in proportion to the acreage contributed.

5. A substantial part of the minerals acquired by Good Pine Oil Company, Inc., including the oil, gas and sulphur in, on and under the lands described in paragraph II of the petition, is now owned by the defendant.

6. Production of oil and gas from the pooled minerals interrupted, and continues to interrupt, prescription with respect to all of the minerals and mineral rights included in the pool and none of the mineral rights acquired by Good Pine Oil Company, Inc. as a result of the pooling agreement, including the mineral rights now owned by the defendant in, on and under the lands described in paragraph II of the petition, will prescribe so long as production is obtained from any of the pooled minerals.

Third Defense.

1. The lands sold and transferred by Bodcaw Lumber Company of Louisiana, Inc. to the United States of America by the deed dated February 11, 1936, were acquired by the United States of America for the sole purpose of establishing a national forest and were purchased under the Weeks Act, as amended, (being Act of March 1, 1911, as amended; 16 U. S. C. A. Secs. 480, 500, 513-519, 521, 552 and 563).

2. The Louisiana Laws of prescription (Articles 789 and 3546 of the Civil Code) are inapplicable to mineral rights

reserved or excepted in conveyances of land to the United States of America for the establishment of a national forest; the rights of the parties in and to the minerals so resered or expected are fixed solely by the terms of the applicable agreements.

3. The sale and transfer to the United States of America by deed dated February 11, 1936, was, by the terms of said deed, made subject to the prior sale by Bodcaw Lumber Company of Louisiana, Inc., of all the oil, gas and sulphur in, on and under said lands to Good Pine Oil Company, Inc., said sale and transfer being made by deed dated November 12, 1932.

4. Under the terms of the deed dated November 12, 1932, all of the oil, gas and sulphur in, on and under a large tract of land in Natchitoches Parish, Louisiana, including the oil, gas and sulphur in, on and under the lands described in paragraph II of the petition, were conveyed by Bodcaw Lumber Company of Louisiana, Inc. to Good Pine Oil Company, Inc. in perpetuity.

5. Moreover, under the terms of the deed November 12, 1932, the drilling operations conducted in 1941, 1942 and 1945 on the lands covered by said deed dated November 12, 1932, preserved and extended all of the mineral rights conveyed thereby to Good Pine Oil Company, Inc.

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Fourth Defense.

1. Under date of May 4, 1935, the Solicitor of the Department of Agriculture rendered a decision ruling that the Louisiana Laws of prescription (Articles 789 and 3546 of the Civil Code) were inapplicable to mineral reservations contained in deeds conveying lands to the United States of America for national forest purposes. On April 17, 1947, the Secretary of the Interior accepted as valid and binding ruling of the Solicitor of the Department of Agriculture dated May 4, 1935.

2. The decision of the Solicitor of the Department of Agriculture dated May 4, 1935, was based on the following finding of fact:

"Owners of large tracts of land do not wish to sell their lands to the United States for National Forest purposes unless they can reserve to themselves the oil and gas rights for longer periods than ten years and want assurance that these rights will not be prescribed by non-user of ten years."

3. Prior to February 11, 1936, a copy of the Solicitor's decision dated May 4, 1935, was forwarded to Bodcaw Lumber Company of Louisiana, Inc. by the representatives of the United States who were negotiating the sale.

4. Thereafter, Bodcaw Lumber Company of Louisiana, Inc., through its duly authorized agents, executed and delivered to the United States of America the deed dated February 11, 1936.

5. In reliance upon the decision of the Solicitor of the Department of Agriculture dated May 4, 1935, and in reliance upon prior assurances by representatives of the United States that the minerals owned by Good Pine Oil Company, Inc. were not subject to the Louisiana laws of prescription, the defendant has not exercised its mineral rights in and under some of the lands conveyed to the United States of America by the deed dated February 11, 1936, including the mineral rights in and under the lands described in paragraph II of the petition.

6. The plaintiff cannot now reject the decision of the Solicitor of the Department of Agriculture dated May 4, 1935, and the decision of the Secretary of the Interior dated April 17, 1947, and assert that the mineral rights reserved and excepted in the deed dated February 11, 1936, have prescribed under Articles 789 and 3546 of the Civil Code of the State of Louisiana.

Counterclaim.

1. The conveyance of land by Bodcaw Lumber Company of Louisiana, Inc. to the United States of America by deed dated February 11, 1936, was based on the assumption that the mineral rights previously sold and conveyed in Good Pine Oil Company, Inc. by deed dated November 12, 1932, would not be subject to prescription under Articles 789 and 3546 of the Civil Code of the State of Louisiana.

2. The conditions of the sale to the United States of America and the price fixed for the land sold were based on the assumption that the minerals under the land sold were

vested in perpetuity in Good Pine Oil Company, Inc. or its successors and would not revert to the United States of America by prescription.

3. It the Court holds that the mineral rights conveyed to said Good Pine Oil Company, Inc. are subject to prescription under Articles 789 and 3546 of the Civil Code of the State of Louisiana, the sale of land by Bodcaw Lumber Company of Louisiana, Inc. to the United States of America and the deed dated February 11, 1936, were based on a mistaken assumption.

4. If the Court cancels the conveyance dated February 11, 1936, defendant is willing to, and shall, repay the United States of America the sum paid for the land conveyed by such deed, plus interest at the legal rate.

Wherefore, the defendant prays that:

(1) A declaratory judgment be rendered in favor of defendant, Nebo Oil Company, Inc., and against the United States of America decreeing that the minerals, including oil, gas and sulphur, in, on and under the lands described in paragraph II of the petition be vested in Nebo Oil Company, Inc.; or

(2) In the alternative, a decree be entered canceling the conveyance of land covered by the deed dated February 11, 1936.

Appendix I

Petitioner further prays for all others and decree necessary and proper and for full and general relief.

(S.) J. BLANC MONROE,
(S.) MALCOLM L. MONROE,
1424 Whitney Building,
New Orleans, Louisiana.

(S.) JOHN W. BOYLE,
(S.) JAMES D. HELDT,
Attorneys for defendant.
930 Mercantile Bank Building,
Dallas, Texas.

Certificate Omitted.

Filed May 26, 1948.

PHILIP H. MECOM,
Clerk U. S. Dist. Court West. Dist. of La.

APPENDIX J — BRIEF FOR THE UNITED STATES IN *UNITED STATES v. NEBO OIL* FILED FEBRUARY 24, 1950

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA SHREVEPORT DIVISION

Civil Action No. 2379

United States,

Plaintiff

v.

Nebo Oil Company, Inc.,

Defendant

BRIEF FOR THE UNITED STATES

Statement

This action was instituted to obtain a declaratory judgment as to the ownership of mineral rights involved in, and for an injunction restraining the defendant from drilling on, certain lands in Natchitoches Parish, Louisiana, which are described as follows:

> Northeast quarter (N¼); southeast quarter of southeast quarter (SE¼SE¼); west half of southeast quarter (W½ SE¼); west half of southwest quarter (W½SW¼); southwest quarter

> of northwest quarter (SW¼W4); east half of west half (E½W½); Sec. 19, T. 13 N., R. 6 W., La. M.; southeast quarter (SE¼); south half of northeast quarter (S½NE¼); Sec. 24, T. 13 N., R. 7 W., La. M.

These lands were acquired by the United States for inclusion in the Kisatchie National Forest under the provisions of the Weeks Act (Act of March 1, 1971, 36 Stat. 961), from the Bodcaw Lumber Company, by deed dated February 11, 1936 (Ex. G-1). At the time the lands were conveyed to the United States they were subject to a servitude created by a prior sale on November 12, 1932, by the Bodcaw Lumber Company to the Good Pine Oil Company of oil, gas and sulphur rights (Ex. G-2).

The sale of mineral rights of November 12, 1932, by the Bodcaw Lumber Company to the Good Pine Oil Company covered approximately 37,500 acres of land of which the lands involved in this case were a part (Ex. Nebo-2). The instrument granting the mineral rights contained the following provision:

> * * * it being expressly stipulated that none of said rights in any of said lands shall be prescribed unless there shall elapse a FULL PERIOD OF TEN (10) YEARS in which there shall be no exercise of any of the foregoing rights or user of any of the lands aforesaid under and by virtue hereof.

Appendix J

The deed of February 11, 1936, from the Bodcaw Lumber Company to the United States covered approximately 25,000 acres of land of which the lands in suit were a part, and contained certain provisions, among others, purporting to reserve to the grantor all of the oil, gas and sulphur in the lands conveyed, as follows:

> This sale and transfer is made subject to the sale of all the oil, gas and sulphur, in, on, and under all of the lands conveyed herein as shorn by act of sale dated November 12, 1932, * * * wherein Bodcaw Lumber Company of Louisiana, Incorporated, was the vendor, and Good Pine Oil Company, Incorporated, was the vendee. The mention of these mineral sales and of the rights granted therein is made solely for the purpose of limiting vendor's warranty to the United States of America in the present sale, and the recital of the said mineral sales shall in no wise extend or enlarge the same in point of time, or limit, control, or otherwise restrict the manner of exercising its rights by the Good Pine Oil Company, Incorporated, its successors and assigns.
>
> * * *
>
> There are also specially reserved by and unto the Bodcaw Lumber Company of Louisiana, Incorporated, the vendor herein, all the oil, gas and other minerals in, on and under all of the land conveyed herein and which is subject to the two

> sales to the Good Pine Oil Company, Incorporated, mentioned above, for a period of ten years after the expiration of the rights of the said Good Pine Oil Company, Incorporated, under the laws of the State of Louisiana.
>
> * * *
>
> At the termination of the ten (10) year period, if not extended, or at the termination of any extended period * * * the right to drill for and remove oil and gas and to mine and remove minerals shall terminate, and a complete fee in the land become vested in the United States.

It was stipulated at the pre-trial conference held on November 8, 1949, and at the trial that no drilling operations have been conducted since November 12, 1932, on the lands involved in this action or on any lands contiguous thereto (Tr. 2-3; Ex. G-3, G-4).

The Nebo Oil Company, Inc., claims the mineral rights as successor in title to the Good pine Oil Company (Ex. Nebo-42, pp. 10, 13; Nebo-46, pp. 10, 13). It is alleged in the complaint and admitted in the amended answer that the defendant intends to drill a well on the lands described in the complaint and that the defendant has informed the Secretary of the Interior that it will resist any interference by the United States with such proposed drilling operations complaint, par: VII, IX; amended answer, par. 7, 9).

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Questions Presented

1. Whether the mineral rights to the lands in suit which were granted in 1932 by the Bodcaw Lumber Company to the Good Pine Oil Company have become prescribed and the rights of the Nebo Oil Company, Inc., thereto have been extinguished.

2. Whether Louisiana Acts 19110, No. 315, providing that where land is acquired by the United States subject to a prior sale or reservation of oil, gas and other minerals, such rights so reserved or previously sold shall be imprescriptible, is to be construed as being prospective in its operation.

3. If Louisiana Acts 1940, No. 315, is held to be retrospective or retroactive in its operation, then

A. Whether the act is unconstitutional as impairing the obligation of contracts in violation of Section 10, Article I of the Constitution of the United States and

B. Whether the act is unconstitutional as violating Section 1, Amendment XIV of the Constitution of the United States in denying to the United States the equal protection of the law and depriving it of property without due process of law.

4. Then, alternatively and additionally, whether the evidence which the defendant attempted to introduce over the objection of the Government in support of its contention

that the sale of minerals in 1932 from the Bodcaw Lumber Company to the Good Pine Oil Company was part of a "pooling agreement" is admissible.

5. Whether such evidence, if admissible, tends to establish a "pooling agreement" under Louisiana law whereby the drilling of a well on any tract covered by the agreement would interrupt the running of the ten-year prescriptive period as to the entire area whether contiguous or not.

Argument

I

The mineral rights granted by the Bodcaw Lumber Company on November 12, 1932, to the Good Pine Oil Company covering the lands in suit have become prescribed and are vested in the United States.

The defendant, Nebo Oil Company, Inc., who claims title to the mineral rights as successor to the Good Pine Oil Company, has admitted in its amended answer and stipulated at the pre-trial hearing and at the trial of this case that no drilling operations have been conducted on any of the lands involved or on any contiguous lands (amended answer, par. 6; Tr. 2-3; Ex.. G-3, G-4).

Under Louisiana law a reservation, grant or sale of minerals creates only an incorporeal interest in-the nature of a servitude. *Frost-Johnson Lumber Company* v. *Salling's Heirs*, 150 La. 756; *Wemple* v. *Nabors Oil and Gas Company*, 154 La. 483; *Deas* v. *Lane*, 202 La. 933; *Standard Oil Company* v. *Futral*, 204 La. 215.

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Articles 789, 3529 and 3546 of the Revised Louisiana Civil Code provide that the non-use of such mineral rights for a period of ten years will cause the servitude to become prescribed and extinguished. *Frost Lumber Industries* v. *Republic Production Company* , 112 F. 2d 462 (C.C.A. 5, 1940), cert. den. 311 U. S. 676; *Porter-Wadley Lumber Company* v. *Bailey*, 110 F. 2d 974 (C.C.A. 5, 1940), cert. den. 311 U. S. 680; *Lewis* v. *Bodcaw*, 167 La. 1067; *Gaines* v. *Crichton*, 187 La. 345; *Achee* v. *Gaillouet*, 197 La. 313; *Deas* v. *Lane*, 202 La. 933; *Bodcaw* v. *Magnolia Petroleum Company*, 167 La. 847.

The deed from the Bodcaw Lumber Company to the United States dated February 11, 1936, contains a provision, quoted above, purporting to reserve to the grantor all the oil, gas and other minerals in the land subject to two sales to the Good Pine Oil Company (one of which was the sale of November 12, 1932) for a period of ten years after the expiration of the rights of the Good Pine Oil Company under the laws of the State of Louisiana. It was further provided in the deed that at the termination of the ten-year period the right to drill for and remove oil and gas and to mine and remove minerals should terminate and a complete fee in the land become vested in the United States if the mineral rights reserved had not been exercised during the ten-year period. It is well settled under Louisiana law that any attempt by the parties to create a reservation of mineral rights for a period longer than ten years is of no effect, and if the mineral rights have not been exercised within the ten-year period the servitude is extinguished. *Porter-Wadley Lumber Co.* v. *Bailey*, 110 F. 2d 974 (C.C.A. 5, 1940), cert. den. 317 U. S. 680; *Munn* v. *Wadley*, 192 La. 874; *Baker* v. *Wilder*, 204 La.

759; *Hodges* v. *Norton*, 200 La. 614. Consequently, the attempted reservation by the Bodcaw Lumber Company in the deed to the United States of all mineral rights held by the Good Fine Oil Company for a period of ten years after the expiration of the Good Pine Oil Company's rights is therefore invalid and the mineral rights became prescribed and extinguished in November 1942, which was ten years after the grant to the Good Pine Oil Company, there having been no exercise or user of the rights during the original ten-year period. The United States therefore is the owner and holder of the fee simple title to these lands since the lapse of the servitude inures to the benefit of the party owning the land at the time of the prescription or extinguishment of the mineral rights. *Gulf Refining Co.* v. *Orr*, 207 La. 917; *McDonald* v. *Richard*, 203 La. 155; *Ohio Oil Co.* v. *Ferguson*, 213 La. 183, 215.

II

Louisiana Acts 1910 No. 315 should be construed as being prospective in operation and as having no application to this case.

The lands involved in this case were acquired by the United States by warranty deed dated February 11, 1936 (Ex. G-1). In 1940 the Legislature of the State of Louisiana passed an act which purported to render imprescriptible all mineral rights reserved or previously sold where the land subject to such servitude is acquired by the United States. Act No. 315 of 1940 (5 Darts La. Gen. Stats., sec. 7156.4). This act provides in part as follows:

> When land is acquired by conventional deed or contract * * * by the United States of America

> * * * from any person, firm or corporation, and by the act of acquisition * * * oil, gas and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved

This act, if valid, can have a prospective operation only and should not be held to apply to any transactions which occurred prior to its enactment since this would be contrary to Article 8 of the Louisiana Revised Civil Code, which provides:

> A law can prescribe only for the future; it can have no retrospective operation, nor can it impair the obligation of contracts.

There is nothing in the text of the act to indicate that it was intended to have a retrospective or retroactive application. It will be noted that the act applies only where land "*is*" acquired by the United States and not where land "*has been*" acquired by the united States, i.e., the present tense (1940) is used and no mention is made of acquisitions made prior to the act.

> A new provision in Act 315 of 1940 spells out the imprescriptibility of a mineral servitude created prior to acquisition of the land by the United States if the act of acquisition is made expressly "subject to" that servitude. *It should be noted that the 1940 statute does not contain a provision which makes*

> *it apply to conveyances to the federal government prior to its enactment.* * * * [Underscoring supplied.] 22 Tulane L. Rev. 500.

It is submitted therefore that at most the act should be construed as having a prospective operation and should not be held to have any application to the conveyance from the Bodcaw Lumber Company to the United States of February 11, 1936.

The defendant may contend that Act No. 315 of 1940 is remedial or procedural in nature and therefore should be held to be retrospective in its operation. There is a clear and important distinction and difference between statutes which relate to purely procedural matters and those which affect substantive rights, remedies and the exercise of such rights and remedies. Those relating to remedial or procedural matters may have a retrospective operation, but statutes which affect substantive rights and remedies can have only a prospective application. 12 Am. Jur., Const. Law, sec. 431, 432. For example, see Louisiana Acts 1938, No. 205, which provides in part as follows:

> Section 1. Oil, gas and other mineral leases, and contracts applying to and affecting such leases or the right to reduce oil, gas or other minerals to possession, together with the rights, privileges and obligations resulting or flouting therefrom, are hereby defined and classified as *real rights* and *incorporeal immovable property* and may be asserted, protected and defended in the same manner as may be the ownership or possession of

other immovable property by the holder of such rights. * * *

Section 2. This act shall apply to all such transactions whether entered into prior to the passage of this act or not.

This statute classifying mineral rights as real rights and incorporeal immovable property has been held to be remedial and procedural in character and therefore retroactive or retrospective in its operation. *Tyson* v. *Surf Oil Co.*, 195 La. 248; *Allison* v. *Wideman*, 210 La. 314. This Court held the act to be merely remedial and procedural since it does not change any substantive rights. *Coastal Club* v. *Shell Oil*, 45 F. Supp. 859 (W. D. La. 1942). This Court also held the 1938 act, which in effect declares a lessee of mineral rights to have a real right assertable in the courts, to be procedural and that the act does not change or affect the substantive law of mineral servitude or the prescriptive period for asserting the right. *Colgin* v. *Harris*, 27 F. Supp. 798 (W. D. La. 1939). To the same effect see *Lawrence v. Sun Oil Co.*, 166 F. 2d 466 (C.C.A. 5, 1948).

In the present case, however, the sale of minerals by the Bodcaw Lumber Company to the Good Pine Oil Company in 1932 and the deed from the Bodcaw Lumber Company to the United States in 1936 related to mineral rights which by the 1938 act were made real rights and incorporeal immovable property. The sale of minerals to the Good Pine Oil Company and the conveyance to the United States also contained specific provisions and agreements relating to the mineral rights. Consequently, the 1940 act, if retroactive or

retrospective in operation, clearly affects *substantive* rights and cannot be said to be merely "remedial" or "procedural" in character as in the case of Act No. 204 of 1938. Act No. 315 of 1940 cannot be said to be a statute of limitations in the ordinary sense since it in effect divests the United States of a right of property and attempts to make outstanding mineral rights valid forever.[1]

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1. Exhibit Nebo-125 which was admitted over the objection of the Government is a copy of a judgment and reasons for judgment *in* the case of *Whitney National Bank of New Orleans* v. *Little Creek Oil Company, Inc., and Nebo Oil Company, Inc.*, No. 274-518 in the Civil District Court or the Parish of Orleans, State of Louisiana, where Act No. 315 of 1940 was held to be retrospective in effect. On appeal the judgment was reversed by the Supreme Court of Louisiana. *Whitney Nat. Bank* v. *Little Creek Oil Co.*, 212 La. 949.

In that case the Nebo Inc., as lessor, entered into a mineral lease in 1947 with the Little Creek Oil Company, Inc., as lessee, covering certain lands in Sec. 19, T. 13 N., R. 6 W. (of which the lands in suit are a part), and the consideration was deposited with the bank under an escrow agreement pending examination of title. A dispute arose between the lessor and lessee concerning the validity of the lessor's title. The bank deposited the consideration in the registry of the court and interpleaded both the lessor and lessee. The Little Creek Oil Company demanded cancellation of the lease and return of the consideration upon the ground that the lessors mineral rights had prescribed under Louisiana law. The Nebo Oil Company, Inc., contended that the mineral rights were imprescriptible under Act 315 of 1940. The Little Creek Oil Company had pleaded the unconstitutionality of the 1940 act. A judgment in favor of the Nebo oil Company, Inc., was reversed and the suit dismissed for nonjoinder of necessary parties, the court holding that the constitutional issues could not be passed upon in the absence of the United States as a party in the case.

Moreover, if the 1940 act is held to be applicable to this case as being retrospective in operation, it would constitute an interference, with the use by the United Sates of its property and its right of disposal and regulation arising under Art. IV, sec. 3, cl. 2, U. S. Const. It is true that in acquiring these lands the United States did not obtain exclusive jurisdiction over them, but the state has legislative jurisdiction over the lands only insofar as the exercise of that jurisdiction is consistent with federal functions. Title 16, U.S.C. sec. 480; *Wilson* v. *Cook*, 327 U. S. 474, 487. It is for this reason that only those laws in effect at the time the United States acquired the property should be held to apply. *Arlington Hotel Co.* v. *Font*, 278 U. S. 439; *Williams* v. *Arlington Hotel Co.*, 22 F. 2d 669 (C.C.A. 8, 1927); *Capetola* v. *Barclay White Co.*, 139 F. 2d 556 (C.C.A. 3, 1943), cert. den. 321 U. S. 799; *James Stewart Co.* v. *Sadrakula*, 309 U. S. 94. It is well settled that where the United States has not acquired exclusive jurisdiction over its lands within a state, the lands remain as part of the states territory and within the operation of its laws except that the state may not affect the title of the United States or interfere with it in the use of the lands or with the Government's right of disposal and regulation. *Utah Power and Light Co.* v. *United States*, 243 U. S. 389; *James* v. *Dravo Construction Co.*, 302 U. S. 134, 141; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 650. In the case of *United States* v. *Allegheny County*, 322 U. S. 174, the court said at page 182:

> The Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United

States . . ." Art. IV, § 3, cl. 2. It also gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution" all powers vested in the Government or in any department or officer thereof, Art. 1, § 8, cl. 18, and it makes the Laws of the United States enacted pursuant thereto "the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

* * *

* * * The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts *which would* follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal Law not controlled by the Law of any State. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *Jackson County* v. *United States*, 308 U. S. 343; *Carpenter* v. *Shaw*, 280 U. S. 363; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452; see *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U. S. 447; *Deitrick v. Greaney*, 309 U. S. 190; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95. * * *

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III

Louisiana Acts 1940 No. 315 if retrospective in its application, is unconstitutional as impairing the obligation of contracts in violation of Sec. 10, Art. 1 of the Constitution of the United States.

The grant of mineral rights in 1932 by the Bodcaw Lumber Company to the Good Pine Oil Company specifically provided that none of the mineral rights should be prescribed unless a period of ten years should elapse in which there was no exercise or user of the mineral rights granted (Ex. G-2). The deed from the Bodcaw Lumber Company to the United States in 1936 not only was a conveyance but also a contract containing several agreements, conditions and provisions. One of the provisions was to the effect that the mention of the mineral sales and of the rights granted therein to the Good Pine oil Company in 1932 "*shall in no wise extend or enlarge the same in of time*, or limit, control or otherwise restrict the manner of exercising its rights by the Good Pine Oil Company, Incorporated, its successors and assigns." [Underscoring supplied.] The grant of minerals to the Good Pine Oil Company and the deed to the United States constitute definite agreements under the law then existing that the mineral servitude should not extend for a period longer than ten years, if the rights to the minerals were not exercised during that period. *Frost Lumber Industries* v. *Republic Production Company*, 112 F. 2d 462 (C.C.A. 5, 1940), cert. den. 311 U. S. 676; *Porter-Wadley Lumber Company* v. *Bailey*, 110 F. 2d 974 (C.C.A. 5, 1940), cert. den. 311 U. S. 680; *Lewis* v. *Bodcaw*, 167 La. 1067; *Gaines* v. *Crichton*, 187 La. 345; *Aches* v. *Gaillouet*, 197 La. 313; *Deas* v. *Lane*,

202 La. 933; *Bodcaw* v. *Magnolia Petroleum Company*, 167 La. 847; *Munn* v. *Wadley*, 192 La. 874; *Baker* v. *Wilder*, 204 La. 759; *Hodges* v. *Norton*, 200 La. 614. See *Haas* v. *Board of Commissioners*, 206 La. 378; *Shreveport Long Leaf Lumber Company* v. *Wilson*, 195 La. 814; *Davis' Heirs* v. *Elkins*, 9 La. 135; *State* v. *Bermudez*, 12 La. 352.

The general role is stated in 12 Am. Jur. Const. Law, sec. 386 (p. 14), as follows:

> Sec. 386. *Existing Laws as Establishing Obligations*. - Conformably to the well-established rule that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to, or incorporated in, its terms, the obligation of a contract is measured by the standard of the laws in force at the time it was entered into, and its performance is to be regulated by the terms and rules which they prescribe. * * *

By Louisiana Acts 1938, No. 205, mineral leases, contracts affecting such leases and mineral rights were defined and classified as real rights and incorporeal immovable property. In the case of *Trustees of Dartmouth College* v. *Woodward*, 17 U. S. 518, it was held that all incorporeal hereditaments are valuable in law and whenever they are the subject of a contract or grant they are as much within the reach of the constitutional provision prohibiting states from passing laws impairing contractual obligations as any other grant. On this point see also *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189; *Coolidge* v. *Long*, 282

U. S. 582. Consequently the laws in effect at the time of the grant of the mineral rights to the Good Pine Oil Company and the conveyance to the United States must be deemed to have entered into and formed a part of those agreements in the same manner as if they were expressly referred to or incorporated in their terms. *Van Hoffman* v. *City of Quincy*, 71 U. S. 535, 550. It has also been held that any law which, in its operation, amounts to a denial or obstruction of rights accruing by contract, though professing to act only on the remedy, violates the constitutional inhibition against legislation impairing the obligation of contract. *Pritchard* v. *Norton*, 106 U. S. 124. Undoubtedly, a statute which does not affect substantive rights or remedies may have a retrospective operation, but where it interferes with contractual or property rights it cannot be said to be merely remedial or procedural, and thus it must be construed to have only a prospective application, if otherwise valid. The test has been well stated in 12 Am. Jur., Const. Law, sec. 434 (p. 74), as follows:

> A general test which is used frequently is that the obligation of a contract is impaired where *the remedy is taken away or abolished*, the legal obligation is diminished, suspended or destroyed by relaxing or *abolishing the legal remedy*, or the proceedings for enforcement are burdened with new conditions or restrictions. A more particular test frequently advanced is that only such repeals or changes of any of the remedies existing as to the enforcement of a contract as serve to lessen the value of an agreement or which substantially interfere with, abridge, obstruct, or *unreasonably delay* rights thereunder impair the obligation. [Underscoring supplied.]

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It is submitted that the 1940 act providing that outstanding *min*eral rights shall be imprescriptible when land is acquired by the United States impairs the obligation of contract since the act not only removes but in effect abolishes any remedies as to the mineral rights and substantially interferes with and unreasonably delays the exercise by the United States of its rights to the minerals.

IV

Louisiana Acts 1940, No. 315 is unconstitutional as denying to the United States the equal protection of the law and depriving it of property without due process of law in violation of section 1, Amendment XIV, of the Constitution of the United States.

U. S. Const. Amend. XIV, sec. 1, provides that no state shall "deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[2] Act No. 315 of 1940 clearly discriminates against the United States. Mineral rights previously sold or reserved are made imprescriptible by the act only when the United States acquires land subject to such mineral rights. The act is not made applicable to any other owner of land, the result being that every owner of land in Louisiana, except the United States, obtains title to outstanding mineral rights in the land if there has been no exercise or user of the rights for a period

2. For cases holding that the United States is a person see *United States* v. *Cooper Corp.*, 312 U. S. 600; *Stanley* v. *Schwalby*, 147 U. S. 508, 517; *Ohio* v. *Helvering*, 292 U. S. 360, 370; *Helvering* v. *Stockholms, etc., Bank*, 293 U. S. 84, 92.

of ten years. *Gulf Refining Co.* v. *Orr*, 207 La. 915; *McDonald* v. *Richard*, 203 La. 155; *Ohio Oil Co.* v. *Ferguson*, 213 La. 183, 215. Under such circumstances the United States, as the owner of land in Louisiana, has been denied the equal protection of the laws. *Pavel* v. *Pattison*, 24 F. Supp. 915 (W. D. La. 1938). That case involved a Louisiana statute (No. 80 of 1926) which purported to deny to nonresident owners of land in Louisiana the right to trap alligators and furbearing animals unless such owners had resided continuously within the state for one year preceding the opening of the trapping season. A three-judge court held the act to be unconstitutional and restrained its enforcement as depriving nonresident owners of a property right and denying to them the equal protection of the laws. The court said at pp. 918-919 of the opinion:

> If the State, under the circumstances disclosed in the present case, can prevent the non-resident owner of land from exercising the right to trap it on equal terms with citizens of the State, by denying to him a license or permit except on the condition of his becoming a resident of the State for one year, then it could make the term ten or twenty years, just as well, and which would be, for all practical purposes, to deny it altogether.
>
> * * *
>
> * * * The plaintiff Pavel is entitled to deal with his property on an equal footing with other landowners residing in the State * * *.

See also *Pavel* v. *Richard*, 28 F. Supp. 992 (W. D. La. 1938).

Thus in the present case Act No. 315 of 1940 discriminates against the United States in depriving it of a property right and does not permit the Government to deal with its property within the state on an equal footing with other landowners, whether resident or nonresident. It is submitted that under the decision in *Pavel* v. *Pattison*, *supra*, if Act No. 315 of 1940 had provided that the prescriptive period as to the United States should be twenty years (the period being ten years for all other landowners), the act would be unconstitutional as denying to the United States the equal protection of the laws. Act No. 315, however, went even further and provided that where the United States acquires land subject to mineral rights reserved or previously sold, such rights shall be imprescriptible, and thereby absolutely denies to the United States the right to obtain title to the reserved mineral rights by any lapse of time whatsoever although a ten-year period of prescription applies in the case of all other owners. Other cases directly in point are *Toomer* v. *Witsell*, 334 U. S. 385; *Rockton & Rion Ry.* v. *Davis*, 159 F. 2d 291 (C.C.A. 4, 1946), cert. den. 324 U. S. 880; *Caldwell* v. *Alabama Dry Dock & Shipbuilding Co.*, 161 F. 2d 83 (C.C.A. 5, 1947), cert. den. 332 U. S. 759.

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V

The Government's objections to the introduction of evidence by the defendant in support of its contention that the sale of mineral rights of November 12, 1932, from the Bodcaw Lumber Company to the Good Pine Oil Company was part of a "pooling agreement" should be sustained.

At the trial the defendant attempted to introduce evidence to establish that the sale of mineral rights of November 12, 1932, from the Bodcaw Lumber Company to the Good Pine Oil Company was part of a "pooling agreement." The Government objected to the introduction of such evidence' as violating Article 2276 of the Revised Civil Code of Louisiana and as being an attempt to vary, alter or contradict by parol evidence the terms of a written instrument (Tr. 8-10, 32-33, 37-39, 59-62). The court tentatively admitted the evidence burdened with the objections made by the Government subject to a later ruling as to its admissibility (Tr. 9, 11, 35, 36, 37, 38, 62-63, 87-87).

There is nothing in the instrument granting the mineral rights to the Good Pine Oil Company which indicates in any way that such grant was part of or intended to be part of a "pooling agreement." Consequently, any evidence attempting to vary, alter or contradict the terms of the sale is inadmissible, Article 2276 of the Revised Civil Code of Louisiana. *Wier* v. *Texas Co.*, 79 F. Supp. 299 (W. D. La. 1948). In that case, which was decided by this Court, it was held that evidence attempting to vary, alter or contradict by parol evidence the terms of a written agreement of sale and a

deed was inadmissible, citing *Hanby* v. *Texas Co.*, 140 La. 189; *Walker* v. *Fershaud*, 210 La. 283; *Monroe Investment Co.* v. *Ford*, 168 La. 475, *Locascio* v. *First State Bank & Trust Co.*, 168 La. 723. It may also be pointed out that by virtue of Louisiana. Acts 1938, No. 205, mineral leases and contracts applying to such leases as well as mineral rights are classified as real rights and incorporeal immovable property. Since the instrument granting the minerals and mineral rights to the Good Pine Oil Company relates to an interest in real property, the parol evidence rule should be applied and the Governments objections sustained. It was held in the case of *Hatch* v. *Morgan*, 12 So. 2d 476 (La. App.) that a sale of minerals and mineral rights is a sale of a "real right" in legal contemplation, and parol testimony is inadmissible to contradict, alter or vary the sale.

VI

The evidence offered by the defendant, even if admissible does not establish that the sale of minerals and mineral rights by the Bodcaw Lumber Company to the Good Pine Oil Company of November 12, 1932, was part of a "pooling agreement" under Louisiana law.

The evidence in support of the defendants contention that the sale of minerals and mineral rights by the Bodcaw Lumber Company to the Good Pine Oil Company of November 12, 1932, covering the lands in suit was part of a "pooling agreement" may be summarized as follows: In 1932 and 1934 the Bodcaw Lumber Company, the Grant Timber & Manufacturing Company, the Good Pine Lumber

Company, the Tall Timber Lumber Company and the Trout Creek Lumber Company by separate instruments granted to the Good Pine Oil Company the oil, gas and sulphur and mineral rights thereto in approximately 400,000 acres of land in Bienville, Bossier, Webster, Winn, Natchitoches, Grant, LaSalle and Catahoula Parishes (Ex. Nebo-2 - Nebo-19, inclusive). The sale of minerals of November 12, 1932, by the Bodcaw Lumber Company to the Good Pine Oil Company (Exs. G-2, Nebo-2) covered approximately 37,500 acres of land in Natchitoches Parish, of which the lands in suit were a part. In all, the five companies mentioned above executed seventeen separate sales of minerals. The consideration for the sale of minerals and mineral rights was the issuance of stock by the Good Pine Oil Company to the five timber and lumber companies in proportion to the acreage covered by the grants of minerals and mineral rights (Ex. Nebo-40). in 1934, 1935 and 1936 the United States acquired title to approximately 185,000 acres of these lands by purchase or condemnation (Exs. Nebo-67, Nebo-68). Thereafter the Good Pine Oil Company was dissolved and the mineral rights held by the company transferred to its stockholders, the five timber and lumber companies having been dissolved in the meantime (Tr. 131-132; Ex. Nebo-42). These stockholders then formed three corporations - the Nebo Oil Company, Inc., the Little Creek Oil Company and the Olla Oil Company (Tr. 132), and the mineral interests held by the former stockholders of the Good Pine Oil Company were transferred to these three corporations in 1942 (Tr. 132-133; Exs. Nebo-45, Nebo-46). The Little Creek Oil Company and the Olla Oil Company were dissolved and their holdings were purchased by the Nebo Oil Company, Inc., in 1948 (Tr. 134).

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The various sales of minerals by the five timber and lumber companies to the Good Pine Oil Company were made by separate instruments, and there is no statement, provision or indication in any of the instruments that a "pooling agreement" was intended or contemplated. Moreover, the various grants of mineral rights to the Good Pine Oil Company covered lands in several parishes and involved many separate and non-contiguous tracts. In the case of *Frost Lumber Industries* v. *Republic Products Co.*, 112 F. 2d 462 (C.C.A. 5, 1940), cert. den. 311 U. S. 676, the court said at p. 465:

> A grant of minerals creates as many separate servitudes as there are separate tracts of land involved; but as to each continuous and contiguous tract, regardless of its size, there exists but one servitude; and the exercise of its servitude upon any part of such tract preserves the servitude as to the whole tract.
>
> Under Louisiana law servitudes on non-contiguous tracts of land, although embraced in one instrument, are treated as separate and distinct servitudes and the development of the servitude on one tract is not the development of the servitude on the non contiguous tract.

The evidence summarized above can in no way be said to be a pooling or unitizing arrangement since the activities of one landowner cannot constitute a pooling agreement nor can the activities of the holders or owners of minerals or mineral rights without the consent of the landowner constitute

a pooling agreement. *Robinson* v. *Horton*, 197 La. 919; *Spears* v. *Nesbitt*, 197 La. 931; *Dobbins* v. *Hodges*, 208 La. 143; *Farrell* v. *Simms*, 209 La. 1072.

In the cases above cited, the situation was presented in which owners of land and the owners of mineral rights therein, as well as other parties, entered into formal written agreements unitizing or pooling their mineral interests by creating a joint lease to develop the property. The agreements involved in those cases provided for a division of royalties in proportion to the interest of each party, and, for the most part, provided that any well drilled on any part of the property was to be considered as having been drilled on the property covered by the written agreements. The court emphasized the point that the rights of the parties to the agreements were not governed by the law of servitudes and that the question of the contiguity or non-contiguity of the lands was immaterial in those cases where that issue was involved, and held that the rights of the parties were governed by the terms of their joint and indivisible contracts and that the parties were bound by their agreements. It is clear therefore that the evidence submitted by the defendant does not establish a unitizing or pooling of interests within the scope of these decisions. *Ohio Oil Co.* v. *Ferguson*, 213 La. 183.

For the reasons stated, a judgment should be entered declaring that the United States is the owner of the mineral rights to the lands described in the complaint and that the rights claimed by the Hobo Oil Company, Inc., have become prescribed and have been extinguished, and an injunction should be issued restraining the defendant from drilling on the lands involved in this case.

Respectfully submitted,

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